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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 83

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

H. B. ZACHRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum decision of the District Court on the petition for preliminary injunction (R. 43–47) is not reported. The memorandum opinion of the District Court upon final disposition of the case (R. 71–76) is reported unofficially at 13 W.H. Cases 881. The opinion of the Court of Appeals (R. 91–99) is reported at 262 F. 2d 546.

JURISDICTION

The judgment of the Court of Appeals was entered January 5, 1959 (R. 99). By order of Mr. Justice Black, dated March 26, 1959, the time for filing a petition for a writ of certiorari was extended to June

1, 1959 (R. 100). The petition was filed on May 29, 1959, and was granted on October 12, 1959 (R. 100). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Respondent is a large construction contractor engaged primarily in the construction of industrial projects, including highways, railroads, airfield facilities, power lines, dams and water facilities. The employees involved here have been engaged in the construction of a six million dollar dam and reservoir (the physical construction part of a 15½ million dollar project), designed to inundate, replace and expand the existing dam and water facilities serving the industrial city of Corpus Christi, Texas, and vicinity, in order to furnish "a much needed and more abundant source of water supply" to insure ability to meet present and increasing requirements. Between 40 and 50 percent of the total water furnished by the City has been to industrial users. A substantial proportion of the water furnished and to be furnished by the City is to interstate instrumentalities such as railroads, truck transportation companies and the airport, and to producers of goods for interstate commerce (which include "practically all of the major industries" in the City and vicinity).

The primary question presented is:

1. Whether respondent's employees engaged in the construction of this project were engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

If the trial court was correct in ruling that this

construction project was within the Act's coverage, another question presented is:

2. Whether an injunction restricted to this single project (construction of which was virtually completed by the time judgment was entered) is an adequate exercise of the judicial authority provided by Section 17 of the Act to restrain future violations, where the employer has violated the Act on other projects in the past and has not made, or agreed to make, restitution of substantial underpayments due employees for past violations.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*) are set forth in the Appendix, *infra,* pp. 82–83.

STATEMENT

1. This action was brought by the Secretary of Labor pursuant to Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime requirements of the Act. Respondent is a large construction company, incorporated in Delaware with its principal office in San Antonio, Texas (R. 3, 14), engaged primarily in the construction of industrial projects such as highways, railroads, power lines, dams, and water facilities (R. 91). In the three years before trial, it had completed a total of 185 projects valued at over $77,000,000, most of which projects were concededly of an interstate character subject to the Fair Labor Standards Act (R. 74–75).

The project in question was a $6,170,378 contract (Plf. Exh. 7)[1] for the construction of a dam and impounding facilities—the physical construction part of a project costing a total of 15½ million dollars (R. 26)—on the Lower Nueces River near Mathis, Texas, referred to in these proceedings as the Mathis Dam. Construction of the project continued over a period of approximately two years,[2] during which time a large number of construction workers, ranging from 85 to 400, were employed by respondent on the project (R. 14–15). Noncompliance with the overtime requirements of the Act with respect to these construction workers is undisputed,[3] respondent contending that they were not covered by the Act (R. 44). The difference between the amounts paid to these employees and the amounts that would be due under the Act was estimated by the Government investigator to be

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[1] Since the exhibits in this case are documents of considerable length, the Court of Appeals granted the joint motion of the parties to file only the original documents with the record on appeal (R. 82), and the parties have agreed, by stipulation filed on November 4, 1959, that they should not be printed, but may nevertheless be referred to in brief and argument.

[2] The contract for construction was dated October 1955 (Plf. Exh. 7) and work was scheduled to be completed by the end of 1957 (R. 23). It was more than 99 percent completed at the time of the trial on February 21, 1958 (R. 52).

[3] The violations charged and found relate only to workers "engaged in actual construction work" at the dam (R. 74, 18–19, 22–23).

Respondent paid overtime rates for any work done in excess of eight hours a day, but not for the first eight hours of Saturday work even though an employee had already worked forty or more hours that particular week.

in excess of $70,000 (R. 20), and conceded by respondent to be in the neighborhood of $50,000 (R. 66).

The trial court in its preliminary opinion (after a hearing on the Secretary's motion for a preliminary injunction) (R. 45–46), and again in its final opinion (R. 74), held that the Act was applicable. It declined, however, to enjoin respondent with respect to future similar projects, limiting its injunction to the Mathis Dam project (R. 76–77), which by the time of final judgment was virtually completed (R. 52).

The Court of Appeals reversed the coverage ruling and held that the construction employees at the dam were not covered by the Act (R. 98–99). Accordingly, it did not reach the issue, presented by the Secretary's cross appeal (R. 78–79), whether the trial court, in limiting its injunction to the single (virtually completed) project, had exceeded the bounds of sound judicial discretion.

2. The facts pertinent to the question of coverage are not in dispute.

Respondent was under contract with the Lower Nueces River Water Supply District to build a dam some 1,400 feet downstream from the existing dam (R. 28), which would be submerged upon completion of the new dam, but protected and "maintained intact" until such completion so that the water supply from the existing dam and reservoir would not be interrupted (Plf. Exh. 7)[4]—"to the end that the City [Corpus Christi, Texas] shall continue to have a supply of water uninterfered with by and during con-

[4] See footnote 1, *supra*.

struction operations" (Plf. Exh. 1, p. 4). The project was designed "to furnish the City with a direly needed additional water supply to insure it the ability to meet its present requirements and for its future growth and development," by taking advantage of the City's right to impound more waters of the Nueces River, which could "not be realized by the present impounding facilities" (*id.* at p. 2). The new dam would create a reservoir "of much greater capacity, offering to the City a much needed and more abundant source of water supply than that afforded by the present facilities" (*ibid.*).

According to the trial court's uncontested findings, "the purpose of the new dam was to provide a tremendously enlarged reservoir, which will inundate the existing dam and reservoir, and furnish an adequate water supply for the city" (R. 45). It was, the court found, "the most practicable means of enlarging the existing water reservoir so as to enable the city to secure a much needed and more abundant source of water supply" (R. 46).

The city water system serves a district with a population of approximately 200,000, including the industrialized city of Corpus Christi, with a population of approximately 165,000 (R. 30). Among the industries served by, and dependent upon, the city water system are railroads, truck transportation companies, the airport and other instrumentalities of interstate commerce (R. 32–33), and various producers of goods for commerce (R. 35–37). It is conceded that "practically all the major industries in this area" sell their

products in interstate commerce (R. 35) and there "is no dispute that these industries use a large quantity of water"—"it is admitted they use a substantial amount of water in connection with their production of goods, a substantial portion of which move[s] in commerce" (R. 36–37). Corpus Christi is "an important oil refining and shipping center of the Gulf Coast [whose] industries include cotton compressing, production of sheet metals and chemicals,"[5] carbon-black manufacturing, zinc refining, foundries, alkali-chemicals and cement plants, cotton ginning, cottonseed oil mills, and the manufacture of oil-field supplies and paint.[6]

The trial court found that "A substantial amount of the water furnished and to be furnished by the city is to industries producing goods which move in interstate commerce" and "largely is used in the productive process but, in some instances, it becomes an ingredient of the goods produced and subsequently moving in commerce" (R. 45). More particularly, the City's water consumption records show that from 40 to 50% of the total volume of water furnished by the City's existing system during the two years preceding the trial of this case was to industrial users (as distinguished from residential, commercial, hospital, municipal, and other users), and that the amount furnished industrial users averaged more than half a billion gallons a month (Plf. Exh. 6).[7]

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[5] See Moody's *Governments & Municipals*, 1959, p. 1782.

[6] See The Columbia Lippincott Gazetteer of the World (Columbia Univ. Press, 1952), p. 452.

[7] See footnote 1, *supra*.

On the basis of these facts, the District Court concluded that the construction project, "while providing a new and larger dam and reservoir, actually supersedes, incorporates and makes use of the existing dam and reservoir so that by all practical considerations, as distinguished [from] technical conceptions, it is at once an improvement, a rebuilding and a new construction", which was "so directly and vitally related to furnishing water which the city in turn will furnish to water users producing goods in commerce as to be in practical effect an unbroken chain in, and part of, such commerce rather than an isolated, local activity" (R. 46). Accordingly, it held the construction work to be covered by the Act (1) as "closely related" and "directly essential" to the production of goods for commerce by such water users (R. 72–73); and, in addition, (2) as production of goods "for commerce" by reason of its "supplying goods [water] essential to the functioning of interstate instrumentalities", under the principle of *Alstate Construction Co.* v. *Durkin,* 345 U.S. 13 (R. 45).

However, despite the evidence of prior violations by, and prior litigation with, respondent on other projects, and the need for repeated investigations of respondent in the past, and despite the evidence of the substantial financial advantage acquired by respondent through accumulated unpaid wage deficiencies while contesting and litigating coverage (discussed more fully in the Argument, *infra,* p. 66 *ff*), the District Court declined to grant an injunction restraining future violations generally or on similar

projects, and limited injunctive relief to the single construction project here in issue (which, as above noted, was at that time virtually completed).

3. The Court of Appeals, although recognizing that "[i]ndustries in and around Corpus Christi used large quantities of water from the present water system and reservoir and will continue to do so as a necessary part of their activities in producing goods for commerce" (R. 92), reversed the District Court on the ground that the construction work was not "closely related" and "directly essential" to the production of goods for commerce within the meaning of Section 3(j) of the Act, as amended in 1949 (R. 98–99). It made no reference to the additional ruling of the District Court that the work was covered production of goods "for commerce" under the principle of the *Alstate* decision, *supra*.

In view of its ruling on the coverage issue, the Court of Appeals did not reach the question whether the trial court's narrow limitation of the injunction was within the reasonable bounds of sound judicial discretion.

SUMMARY OF ARGUMENT

I

The Court of Appeals for the Fifth Circuit, reversing the District Court's ruling that the construction work here was "production of goods for commerce" within the coverage of the Fair Labor Standards Act, rejected the lower court's reliance upon this Court's *Vollmer* and *Alstate* decisions[8] and the Eighth and

[8] *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13.

Tenth Circuits' *Chambers Construction Company* decisions[9] on the ground that *Vollmer* and *Alstate* involved the "in commerce" phase of the Fair Labor Standards Act coverage and therefore afforded "little guidance in construing" the Act's "production of goods for commerce" phase. The Court of Appeals thus mistakenly regarded as irrelevant the "practical considerations" which this Court held determinative of coverage in *Vollmer* and *Alstate* (and most recently in *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207), and ignored the undisputed evidence of the direct and vital dependence of the interstate instrumentalities and interstate production facilities upon the large quantities of water supplied by the water system which this construction work was designed to enlarge and replace.

A. If, as we contend, the "liberal" and "practical" standards of *Vollmer, Alstate* and *Lublin* (rather than technical conceptions) are equally as applicable to determining the Act's "production" coverage as its "in commerce" phase, the practical considerations unquestionably support the District Court's decision of coverage. The Statement, *supra*, has made clear the close connection of this project with the many interstate instrumentalities and producers in the area.

Barring technical conceptions such as the "new construction" doctrine on which the Court of Appeals heavily relied, there is no adequate basis for holding that work which is "so directly and vitally related to

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[9] *Chambers Construction Company* v. *Mitchell*, 233 F. 2d 717 (C.A. 8), and *Mitchell* v. *Chambers Construction Co.*, 214 F. 2d 515 (C.A. 10).

the functioning of an instrumentality or facility of interstate commerce" as to be within the scope of the "in commerce" coverage (see *Lublin*, 358 U.S. at 212) is not also "closely related" and "directly essential" to the production of goods for commerce where the functioning of the interstate production facilities is similarly and equally related to and dependent upon the work. Not only the District Court below, but in the three other wage-and-hour cases involving construction of improvement or extensions of similar water systems, the courts have had no hesitancy, upon concluding that the technical "new construction" doctrine was not determinative, in ruling that such construction work was—by realistic practical standards—within the Act's "production" coverage.

The Court of Appeals does not dispute the District Court's findings of the direct and vital dependence of interstate instrumentalities and interstate production facilities upon an adequate supply of water from the system augmented by construction of the Mathis Dam, but rejects the lower court's coverage ruling primarily on the twin premises: (*a*) that the "new construction" doctrine, admittedly discredited by this Court as a test for determining the "in commerce" coverage of this Act, nevertheless remains intact as a test for determining the Act's "production" aspect of coverage, and (*b*) that the 1949 amendment to Section 3(j) was designed to exclude all such construction work from the scope of the Act's "production" coverage as "local" enterprise. Neither assumption is waranted, and we

deal with them before spelling out the further details of our affirmative case for coverage.

B. The Court of Appeals' reliance on the artificial "new construction" doctrine is inconsistent with the principles and rationale of this Court's decisions, and also erroneously assumes that that doctrine is applicable to projects for the improvement, extension or replacement of existing facilities.

1. The view that *Vollmer's* rejection of the "new construction" concept relates only to the Act's "in commerce" coverage disregards the principle on which that holding rests. In rejecting "technical conceptions", *Vollmer* was following this Court's prior rulings in "production", as well as in "in commerce", cases, as is evident from the Court's specific reliance upon two "production" cases—*Kirschbaum Co.* v. *Walling*, 316 U.S. 517, and *Alstate, supra* The teaching of this line of decisions is that in determining "production" coverage, no less than "in commerce" coverage, the "pertinent inquiry is *not* whether 'new construction' is interstate commerce under the test" of the earlier Federal Employers' Liability Act cases (see *Southern Pacific Co.* v. *Gileo*, 351 U.S. 493, 499; emphasis added), but rather whether the relationship of the work to the "end [interstate] product" (see *Lublin*, 358 U.S. at 212) is such as to bring it within the broad purposes, and the equally broad statutory coverage definitions, of this modern social legislation.

2. As applied to the present case, the Fifth Circuit's extension of the "new construction" doctrine to exclude from coverage work on projects for ex-

pansion or replacement of existing facilities is also inconsistent with the recent *Lublin* ruling that "[w]hatever vitality the 'new construction' doctrine retains after *Mitchell* v. *Vollmer & Co., supra,* and *Southern Pacific Co.* v. *Gileo* [*supra*], it is not applicable here because, as the record shows, [the project] involved the repair, *extension, or relocation of existing facilities*" (358 U.S. at 213; emphasis added).

Long before *Lublin,* it had been firmly established that construction work for the improvement, expansion or "redesigning" of existing facilities of interstate commerce "falls in the same category" as "[r]epair of facilities of interstate commerce" (*Vollmer,* 349 U.S. at 429–430). The legislative explanation of the scope of the "closely related" and "directly essential" language of the 1949 amendment to Section 3(j), similarly, had placed in the same category of employees "who would remain covered" "[e]mployees [engaged in] repairing, maintaining, *improving or enlarging* the buildings, equipment, or facilities of producers of goods" (95 Cong. Rec. 14874–75; emphasis added).

3. Thus, the Fifth Circuit's reliance here on *Murphey* v. *Reed,* 335 U.S. 865, and other pre-*Vollmer* "original" construction decisions, is misplaced. We do not believe that the short *per curiam* order in *Murphey* v. *Reed* (issued, by a closely divided Court, before the question of the applicability of the new construction doctrine to this Act had been directly or adequately presented for judicial consideration) should be viewed as warranting a less practical and realistic reading of the Act's "production" cover-

age than of its "in commerce" coverage. But, in any event, as applied to the present case, the Fifth Circuit's reading of the *Murphey* decision is inconsistent with the principle that the " 'new construction' doctrine * * * is not applicable * * * [to] projects involv[ing] the repair, extension, or relocation of existing facilities" (*Lublin, supra*).

4. The Fifth Circuit's assumption that the "production" phase of coverage is to be more narrowly read than the "in commerce" phase—at least with respect to construction work—is likewise contrary to the previously settled view that "the phrase 'production for commerce' is 'obviously' more flexible and more inclusive than the phrase 'engaged in commerce' " (*Tobin* v. *Johnson,* 198 F. 2d 130, 133 (C.A. 8), certiorari denied, 345 U.S. 915; *Armour & Co.* v. *Wantock,* 323 U.S. 126, 131). While *Armour* antedated the 1949 amendments to the "necessary"-to-production language, the legislative history of that change clearly contradicts the Fifth Circuit's premise that the amended language so radically narrowed the previous scope of "production" coverage as to result in the exclusion of work of this type. "The amended section gives the courts a more specific guide as to the intention of Congress; it does not, however, radically revise the coverage of the act as it has been interpreted by the courts in the past" (95 Cong. Rec. 14942); it "adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage" (95 Cong. Rec. 14874). These general statements of legislative purpose were supple-

mented by a detailed list of specific "typical" classes of employees and specific court decisions which would remain unchanged under the amended language, including the very decisions enunciating the "liberal" and "practical" standards applied by this Court in *Vollmer, Alstate* and *Lublin, supra.* Plainly, the rationale of *Vollmer* and *Lublin* goes to the coverage of the Act generally and has no special relation to the "in commerce" branch. There is no plausible reason, and there is nothing in the statutory text, the legislative history, or the factual context of the two branches of coverage, why "technical conceptions" rather than "practical considerations" should be the criteria in one phase but not the other.

C. Putting to one side the erroneous assumption that the "new construction" doctrine governs here and that the 1949 Amendments removed coverage of this type of work, we believe that the existing judicial precedents, confirmed by the 1949 legislative history, establish the Act's coverage of this construction work, not only as "closely related" and "directly essential" to production of goods for commerce, but as actual "production" of "goods" [water] "for commerce," in the primary sense.

1. (*a*). There is no dispute that, if respondent's construction employees were merely engaged in maintenance and repair of the existing Corpus Christi water facilities, they would be within the Act's coverage as engaged in work "closely related" and "directly essential" to production of goods for commerce. This has long been settled by a consistent

line of decisions, both before and after the 1949 Amendments, upholding the coverage of employees engaged in repair and maintenance of the facilities and equipment of a utility company supplying essential fuel, power, *water,* etc., to interstate instrumentalities and interstate producers.

(*b*). As we have already indicated (*supra,* p. 14), the 1949 amendment to Section 3(j) was not intended to limit this well settled area of coverage. Indeed, the specific decisions most pertinent to the instant case were affirmatively approved by the Senate Conferees' report, along with the explicit statement that the amended language would cover, *inter alia,* employees engaged in "[p]roducing and supplying fuel, power, *water,* or other goods for customers using such goods in the production of different goods for interstate commerce" (95 Cong. Rec. 14874–75; emphasis added). See also the House Managers' report (95 Cong. Rec. 14929).

(*c*). The Fifth Circuit's reliance on *10 East 40th St. Co.* v. *Callus,* 325 U.S. 578, reflects its misapprehension of the 1949 legislative intent and its mistaken view that "[r]eference need not be made to Committee reports or other aids by way of legislative history" to determine "the class of employees to be considered engaged in local enterprises" (R. 96). The reconstruction and expansion of a water supply system admittedly designed to meet the substantial and essential manufacturing needs of industrial users in an industrialized city and shipping center, in which practically every major industry is engaged in com-

merce or in the production of goods for commerce and depends upon the improved water system for continued efficient functioning, is hardly comparable to the *Callus* enterprise—the running of an ordinary office building, some proportion of which happened to be rented for use as sales or administrative offices "for the time being" to manufacturing enterprises engaged *elsewhere* in their manufacturing operations. Such a water supply system, wholly unlike a general office building, is necessarily designed to supply the substantial and essential needs of the *manufacturing processes* of major interstate producers, and the fact that the water system is substantially devoted to these particular needs is clearly no mere incidental consequence. And contrary to the view of the court below, the 1949 amendment to Section 3(j) affords no basis for extending *Callus* to this case. Neither the Senate nor House reports made any reference to *Callus,* and there is clearly no implication in the legislative history of any "Congressional mandate" to broaden the "class of excepted occupations" (see opinion below, R. 99) by extending *Callus.*

(*d*). Respondent's contentions that this construction work was too remote as "a matter of geography" and as "a matter of contractual connection" (Br. in Opp., p. 12) are clearly "technical conceptions" having no relevance to the practical functional relationship of the work in question to the production of goods for commerce. That the geographical distance of the activity from the production of goods for commerce is no criterion of the Act's coverage was long

ago settled by *Borden Co.* v. *Borella*, 325 U.S. 679, 681, upholding the coverage of maintenance employees in Borden's New York central office building, although considerably more "geographically divorced from the manufacturing plants." Respondent's theory of "remoteness in contractual connection" is inconsistent with this Court's decisions upholding coverage of construction work performed by employees of an independent contractor, and the irrelevance of such "contractual connection" was expressly recognized in the legislative reports on the 1949 Amendments (95 Cong. Rec. 14875, 14929).

2. Since the construction work here actually produces (impounds) the water for uses essential to the functioning of interstate instrumentalities, it is production of goods "for commerce" under the principle of *Alstate, supra.* The statement of the court below that the employees here "obviously * * * are not actually, while building the dam, producing any goods for commerce" (R. 93) ignores the practical engineering fact that the very construction of the dam and reservoir impounds or "produces" the water ("goods"), just as coal, natural gas and oil are captured or "produced" by digging or drilling. See *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. 2d 42, 44 (C.A. 5), affirmed 317 U.S. 88, 91. Since this construction work was designed to supply water essential to the functioning of interstate instrumentalities (railroads, trucks, an airport, etc), the workers were engaged in the production of goods "for commerce" in the same manner and degree as the workers preparing materials for the use in

the construction of interstate highway improvements in *Alstate,* or as the employees engaged in producing ice for refrigeration of railroad cars in the "ice company cases" (see *Alstate,* 345 U.S. at 16, fn. 4).

3. Finally, an additional ground for the Act's coverage of the type of construction work here involved—not pressed and, therefore, not ruled upon in either court below (see Petition for Writ of Certiorari, p. 24, fn. 16)—is that some of the water impounded by the construction of the dam actually moves interstate as an "ingredient" of other products, or in its use in the operation of railroads or trucks. While this ground of coverage has not hitherto been pressed in the instant case, we believe it appropriate to advance it in view of the fact that the decision here will serve as the controlling precedent in determining coverage of employment in similar construction work to enlarge water supply facilities, which as pointed out in the petition for certiorari (pp. 25–26) is of considerable current and ever-increasing importance throughout the nation, as the fast-growing use of water by industries, utilities, and the increasing population, expands.

II

While the grant or denial of injunctive relief under Section 17 of the Fair Labor Standards Act may be a matter within the sound discretion of the District Court, the limitation of the injunction in this case to the virtually completed Mathis Dam project, was, in effect, an unwarranted denial of any relief, resting on a misapprehension of the policies of this particu-

lar Act and of the specific enforcement purposes of the Section 17 remedy. The District Court, evidently leaning upon standards announced by the Fifth Circuit's decisions (*Mitchell* v. *Hodges Contracting Company,* 238 F. 2d 380 and *Mitchell* v. *Bland,* 241 F. 2d 808), relied solely on the supposed "disadvantages" or "peril" to which an employer who "has acted in good faith" might be subjected by an injunction, and ignored the interests of the public, of the underpaid employees, and of complying competitors.

This approach, we submit, is quite wrong, and has seriously aggravated the problem of enforcement in the region within the Fifth Circuit's jurisdiction where a large proportion of the violations occur and where resort to judicial enforcement is most frequently required. By erroneously placing the emphasis strongly on solicitude for the non-complying employer, who has already benefited financially from past violations and is in a position to gain similar benefits from future non-compliance while litigating other cases, the Fifth Circuit's standards have obstructed rather than aided in effectuating the national policy of this Act to suppress a significant type of unfair competition. See *United States* v. *Darby,* 312 U.S. 100, 122.

In view of the specific statutory limitation in Section 17, precluding the courts from granting the ordinary equitable remedy of restoration of unpaid wages resulting from past violations, and limiting the effect of the injunction solely to future prohibition of what the statute itself prohibits, it is difficult to see "what undue burden will be placed on respondent by the issuance of an injunction" (see *Lublin, supra,* 358

U.S. 214). On the other hand, there is special reason for an ungrudging use of the injunction remedy to relieve the enforcement agency of some of the burden and expense of repeated investigations of and litigation with the same non-complying employer, and to assure employees and complying competitors that a prior offender will not remain in a position again to profit financially from future non-compliance.

As the instant case indicates, the enforcement problem is particularly acute in the construction industry where any particular project is virtually completed before a case can be investigated and litigated to final judgment. By the time of the trial court's final judgment, the accumulated wage deficiencies estimated by the Government investigator to be in excess of $70,000 (R. 20), and conceded by respondent to be about $50,000 (R. 66), remained unpaid. In these circumstances, the injunction issued by the trial court, limited to this single completed project, left respondent free to retain the accumulated underpayments and to acquire a similar financial advantage while contesting and litigating coverage of any similar future project.

Since the effect of the Section 17 injunction is solely "remedial and not punitive," we submit that neither "good faith" reliance upon advice of counsel, nor undue caution about imposing supposed "disadvantages" upon such a non-complying employer, should warrant relieving him entirely (at the continued expense of others) of "the burden of any uncertainty" in the future. See *McComb* v. *Jacksonville*

Paper Company, 336 U.S. 187, 193; *Overnight Motor Co.* v. *Missel,* 316 U.S. 572, 583.

ARGUMENT

I

EMPLOYEES CONSTRUCTING A DAM AND RESERVOIR TO REPLACE AND ENLARGE AN EXISTING WATER SYSTEM WHICH SUPPLIES LARGE QUANTITIES OF WATER ESSENTIAL TO THE FUNCTIONING OF INTERSTATE INSTRUMENTALITIES AND TO THE PRODUCTION OF GOODS FOR INTERSTATE COMMERCE ARE ENGAGED IN "PRODUCTION OF GOODS FOR COMMERCE" WITHIN THE COVERAGE OF THE FAIR LABOR STANDARDS ACT

The District Court, relying principally on *Mitchell* v. *Vollmer & Co.,* 349 U.S. 427, and the decisions of the Eighth and Tenth Courts of Appeals in *Chambers Construction Company* v. *Mitchell,* 233 F. 2d 717 (C.A. 8) and *Mitchell* v. *Chambers Const. Co.,* 214 F. 2d 515 (C.A. 10), emphasized the direct and vital dependence of the interstate instrumentalities, and of the manufacturing processes of the producers of goods for commerce, upon the large quantities of water supplied by this water system. It concluded that construction work designed to improve, enlarge or replace such a water system, even though "new construction", is both "closely related" and "directly essential" to production of goods for commerce, and also production of goods "for commerce" in the primary sense (*i.e.,* production of the water essential for the functioning of interstate instrumentalities) under the principle of *Alstate Construction Co.* v. *Durkin,* 345 U.S. 13.

The Court of Appeals, in reversing the District Court, rejected its reliance upon *Vollmer* and *Chambers*, on the grounds that *Vollmer's* rationale was limited to the Act's "in commerce" coverage and that the Eighth Circuit in *Chambers* had erroneously "equated the new construction concept as to instrumentalities of commerce, *Mitchell* v. *Vollmer, supra*, with construction of facilities to be used for production of goods" and had thereby failed to recognize "the distinction between these two bases for coverage" (R. 98). Stating that it could "derive little guidance in construing the definition section relating to production of goods for commerce" from *Alstate* and *Vollmer* (R. 98) (apparently overlooking that *Alstate* was a "production" case), the Court of Appeals disregarded the "practical considerations" underlying the coverage rulings in *Vollmer* and *Alstate*, as well as in *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207.

If, as we contend, the *Vollmer* and *Lublin* "liberal" and "practical" standards (rather than technical conceptions) are no less applicable to determining the Act's "production" coverage, the practical considerations of the instant case (comparable to the considerations held determinative in *Vollmer* and *Lublin*) are of foremost importance, and they unquestionably support the District Court's view that construction work designed to improve, enlarge or replace this water system "is so directly and vitally related to furnishing water" which is "essential to the functioning of interstate instrumentalities" and to the manufacturing processes of the producers of goods for commerce,

"as to be in practical effect an unbroken chain in, and a part of, such commerce rather than an isolated, local activity" (R. 45–46).

A

PRACTICAL CONSIDERATIONS SHOW THE DIRECT AND VITAL RELATIONSHIP OF THIS CONSTRUCTION WORK TO THE INTERSTATE INSTRUMENTALITIES AND PRODUCTION FACILITIES DEPENDENT UPON THE WATER SYSTEM

1. It is undisputed that the interstate instrumentalities (railroads, trucking transportation, the airport, the telephone company, etc.) and the major industrial plants in the city of Corpus Christi, Texas, and vicinity, "practically all" of which plants produce goods for interstate sale (R. 35–36), require large quantities of water essential to their functioning or productive processes; that these water requirements have been and will continue to be dependent upon the water system, which the construction project here in issue was designed to replace and enlarge; and that this replacement-expansion project was "direly needed" to enable adequate and efficient operation of the existing water system to meet "present requirements" as well as to provide for "future growth and development" (Pltf. Exh. 1, p. 2, 4; R. 45–46).

Water is obviously an essential element in the operation of an industrial complex such as Corpus Christi possesses (see the Statement, *supra*, pp. 6–7). Certainly, railroads, trucking companies, and airports are continuously dependent upon water in the mechanical operation of their vehicles and facilities,

in the refrigeration of freight, in the maintenance of plant and equipment, in the provision of adequate protection against fire hazard, and in the furnishing of accommodations essential to passenger service. In addition to the water needs of such interstate instrumentalities, practically all of the major factories and processing plants in the area, which sell their products in interstate commerce, are also dependent on this water. It is a major supply of power in the form of steam. It is an essential material for the heating of plants and equipment by steam or hot-water systems. It is needed for the cooling of equipment and materials subjected to high temperature processes, for the cleansing of materials and products, for the disposition of industrial waste, for chemical processes, for refrigeration, for sanitation and maintenance of plant and equipment, for fire protection, and for incorporation into various manufactured products. It is inconceivable that a city like Corpus Christi could maintain its level of commercial production if these industrial water requirements were not met.

These are the "practical considerations," in the "pattern of modern industrial organizations" and "the process of economic development" (see *Borden Co.* v. *Borella,* 325 U.S. 679, at 683–684; *Farmers Irrigation Co.* v. *McComb,* 337 U.S. 755, at 761), which relate the construction of the Mathis Dam and Reservoir to the functioning of interstate instrumentalities and the production of goods for interstate commerce, as directly as the construction of an alternate route in

the waterway in *Vollmer* was related to the interstate transportation thereby facilitated, and as the preparation of plans and specifications in *Lublin*, or the preparation of road materials in *Alstate*, were related to the interstate use of the instrumentalities there being repaired, extended or relocated.

In *Vollmer*, the practical consideration held determinative was the fact that the existing canal facilities "already heavy with traffic," were "inadequate" to handle the growing demands of the interstate traffic using the waterway (349 U.S. at 430), and that the new lock was designed to meet this need. The practical case is the same here. The construction of a dam that would provide the additional water supply "direly needed" to meet the current and growing requirements of the area is equally vital and closely related to the functioning of the interstate instrumentalities and the producers for commerce served by the water supply system.

Admittedly, as this Court noted in *Lublin*, "In our modern, technologically-oriented society, the elements which combine to produce a final product are diffuse and variegated," and "[d]eciding whether any one element is so directly related to the end product as to be considered vital is sometimes a difficult problem" (358 U.S. at 212). But we submit that, as in *Lublin*, the circumstances present here warrant "no hesitancy in concluding" that the water supplied by this construction project is also "directly related" and "vital" to the end products. In *Lublin*, the governing practical consideration was "because, without the prepara-

tion of plans for guidance, the construction [of improvements or extensions of various air bases, roads, turnpikes, bus terminals, and radio and television installations] could not be effected and the facilities could not function as planned" (358 U.S. at 212). Plainly, without the present necessary construction to expand the water supply, the interstate instrumentalities and production facilities "could not function as planned." The vital importance of an adequate water supply to the functioning of most industries has always been well known, as is evident from the common practice of advertising the available water supply as an incentive to industries to locate in a particular area. And, just as "plans, drawings and specifications have taken on greater importance as the complexities of design and bidding have increased" (see *Lublin, ibid.*), so construction of enlarged water reservoirs has taken on even greater importance with the increased needs of industries and the newly developed industrial processes requiring enormous amounts of water.

In the instant case, from 40% to 50% of the total volume of water furnished by the existing system during the two years (1955–1957) preceding the trial of this case was to industrial users (see the Statement, *supra,* p. 7). "Use of water by industries and utilities is the fastest-growing segment of [the Nation's] water consumption" (*America's Water Needs: Their Investment Significance,* Domenick & Domenick, N.Y., May 1957 pp. 4–5). American industry, according

to the latest estimates of the United States Department of Commerce, used more than ten times as much water in 1955 as it did in 1900, and almost half as much again as it did in 1950, consuming in 1955 roughly 45% of the total water supply (Business Services Bulletin No. 136, "Water Use in the United States, 1900–1975," table 1), and its proportionate use of the water supply is also climbing.[10]

[10] There is a considerable and fast-growing demand throughout the country for additional supplies of water, a trend which is expected to require, by 1975, more than twice the amount of water now being used (*Natural Resources*, from "The Challenge to America: Its Economic and Social Aspects," a Special Studies Report of the Rockefeller Bros. Fund, 1958, printed in pertinent part at 105 Cong. Rec. 1049).

In absolute figures, the amounts of water consumed in industrial operations are enormous. Electric utilities alone consume 60 billion gallons daily in the steam generation of power, using 75 gallons for each 1,000 kilowatt hours; and a single large steel mill may alone consume 500 million gallons a day (*America's Water Needs*, *supra*). The manufacture of a ton of rayon requires 300,000 gallons of water, and the United States turns out 600,000 tons of rayon a year (*Natural Resources*, *supra*). As the production of kilowatt hours of power, and tons of steel and rayon and other water-consuming products increase, along the well-known current projections of established trends, these figures of water consumption will swell correspondingly. "The recent and current industrial expansion * * * has resulted in a tremendous increase in the total withdrawal of water * * *. This increase in industrial water requirement has strained the capacity of the developed water supplies in many areas * * *." U.S. Geological Survey, *Water Requirements of the Pulp and Paper Industry*, Washington, D.C., 1957, p. iii. The continuing extent of the strain is indicated by the estimate, noted above, that by 1975 "the increase in our population, coupled with the growth of industries which require large quantities of water, will more than double the current rate of water consumption". (*Natural Resources*, *supra*).

2. There is no warrant in this Court's decisions for the evident assumption by the Fifth Circuit that "practical considerations" are less relevant in determining whether particular activities are sufficiently related and essential to interstate commerce to be included within the general terms of the Act's "production" coverage, than they are in making such determination for purposes of "in commerce" coverage. See *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Roland Co.* v. *Walling*, 326 U.S. 657; *Borden, supra; Alstate, supra;* all of which were "production" cases. See also *infra*, p. 42 *ff*. Thus, absent evidence of *legislative* intent to exclude such pratical considerations and to restrict "production" coverage more rigidly and narrowly than "in commerce" coverage,[11] there is no sound basis for the conclusion that work which is "so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce" as to be within the scope of the "in commerce" coverage (see *Lublin*, 358 U.S. at 212) is not, also, "closely related" and "directly essential" to the production of goods for commerce where the functioning of the interstate production facilities is similarly and equally related to and dependent upon such work.

It is not without significance that in the three other wage-and-hour cases involving construction of improvements or extensions of similar water systems, the courts, upon holding that the technical "new construction" doctrine was not determinative, uniformly

[11] As more fully developed (*infra*, pp. 44–46, 49 *ff*.), the legislative history shows clearly that there was no such intent.

ruled, on the basis of the realistic practical considerations, that the construction work was "closely related" and "directly essential" to the production of goods for commerce.

The Eighth Circuit in *Chambers, supra* (decided June 5, 1956) upheld coverage of employees engaged in the construction of a new water main to replace and expand part of the existing municipal water system of the city of Beatrice, Nebraska, whose customers, as here, included railroads, and industrial firms using the water in various ways to manufacture products sold in interstate commerce. And the Tenth Circuit, in the earlier *Chambers* case (decided prior to this Court's *Vollmer* decision) expressly agreed with the Labor Department's view that the Act covered the construction of a new reservoir and chlorinator house designed to connect with and substantially augment the water system of the city of Cheyenne, Wyoming, which, like the Corpus Christi system, furnished large quantities of water both to interstate instrumentalities and to industries engaged in the production of goods for commerce, since it was "an addition to or enlargement of [the] existing water system to meet its expanding needs."[12] Simi-

[12] The Court of Appeals below summarily dismissed the Tenth Circuit's decision as one which "did not need to, and did not, decide the issue" of coverage (R. 98). Coverage, however, was the primary issue on appeal, and although the court's actual decision rested on the ground that its position on coverage was "not decisive of the ultimate question whether the trial court abused its discretion in denying an injunction" (214 F. 2d at 517), its view on the coverage issue was deliberately expressed after full and elaborate consideration of the facts and author-

larly, the recent decision in *Mitchell* v. *S. A. Healy*, (June 23, 1959, N.D. Ill., 14 WH Cases 262, not yet officially reported) (now on appeal to the Seventh Circuit, No. 12777), upheld the coverage of employees engaged in construction of a new water tunnel to expand the capacity of the Chicago water system, relying upon the two *Chambers* decisions, and expressly rejecting the Fifth Circuit's decision in this case as "not represent[ing] the weight of authority" which was substantiated by the legislative history of the 1949 amendment to Section 3(j) of the Act.

3. The Fifth Circuit does not dispute the vital dependence of the interstate instrumentalities and interstate production facilities in the Corpus Christi area upon an adequate supply of water from the system which was augmented by construction of the Mathis Dam, but bases its conclusion primarily on the premises (*a*) that the "new construction" doctrine, admittedly discredited by this Court as a test for determining the "in commerce" coverage of this Act (*Vollmer* and *Lublin, supra;* and *Southern Pacific Co.* v. *Gileo*, 351 U.S. 493), nevertheless remains intact

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ities. It was far from a casual dictum, and is, therefore, entitled to more weight than was accorded it below. Cf. *Railroad Companies* v. *Schutte*, 103 U.S. 118, 143. Indeed, the Fifth Circuit itself, in a prior decision by a different panel, cited the Tenth Circuit's *Chambers* decision as authority for its ruling that a new building constructed as "an improvement of an existing facility—an operating radio station" is within the coverage of the Act "in any vintage," and that *Vollmer*, "decided subsequent to the Trial Court's action, made it [coverage] doubly sure." *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380, 384 (C.A. 5).

as a test for determining the Act's "production" aspect of coverage, and (*b*) that the 1949 amendment to Section 3(j) was designed to exclude all such construction work from the scope of the Act's "production" coverage as "local" enterprise, thus reversing the pre-1949 recognition that "production" coverage was of even greater breadth than "in commerce" coverage.

We shall show that the Fifth Circuit has not only misconceived the basic rationale of *Vollmer* and *Lublin, supra,* but has extended the technical "new construction" doctrine beyond its previous application to "original" construction; and that it has also misconstrued the 1949 amendment to Section 3(j). In addition, we shall show that the District Court's decision below and the two *Chambers* decisions, *supra,* not only correctly apply the principles of this Court's decisions, but are supported by a long line of previous judicial precedents, involving closely parallel circumstances, which received explicit legislative approval at the time of the enactment of the 1949 Amendments. Since the Fifth Circuit's holding rested primarily on its incorrect views as to the applicability of the "new construction doctrine," we shall first discuss that point before further developing the affirmative grounds of coverage on the basis of the pertinent judicial and legislative materials.

B

THE ARTIFICIAL "NEW CONSTRUCTION" DOCTRINE IS INAPPLICABLE

The Fifth Circuit's view that *Vollmer's* rejection of the "new construction" concept relates only to the

Act's "in commerce" coverage disregards the principle on which that holding rests. While *Vollmer* was concerned with a project involving the Act's "in commerce" coverage, reliance was placed on two "production" decisions (*Kirschbaum* and *Alstate*[13]) to support its specific ruling that the Act's coverage is not to be controlled by the "new construction" concept (derived from decisions under an Act "of another vintage") (349 U.S. at 429).[14] *Vollmer's* ruling that "in commerce" coverage is to be "determined by practical considerations, not by technical conceptions" is, in our view, contrary to the inference drawn by the court below that the "production" phase of the Act's coverage may be determined by such "technical conceptions."

In rejecting "technical conceptions," *Vollmer* was following this Court's prior rulings in "production," as well as in "in commerce," cases.[15] *Kirschbaum,*

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[13] *Kirschbaum* v. *Walling*, 316 U.S. 517; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13.

[14] It seems of some significance that the *Vollmer* opinion, throughout, invariably speaks in terms of "an instrumentality or *facility* of interstate commerce" (emphasis added), as does the more recent *Lublin* opinion, 358 U.S. 207.

[15] That *Vollmer's* rejection of the "new construction" doctrine was not limited to "in commerce" coverage seems plain enough on the face of the opinion. The Court explained that the doctrine had its origin in a decision construing the Federal Employers' Liability Act, *Raymond* v. *Chi., Mil. & St. P. Ry. Co.*, 243 U.S. 43, and followed with the statement: "We do not think that case should control this one. We are dealing with a different Act of another vintage—one that has been given a liberal construction from *Kirschbaum* * * * to *Alstate* * * *". (both of which were "production" cases).

one of the earliest decisions on coverage, had established that no "dependable touchstone" or "rigid formulas" or "general propositions" could be used to determine "whether employees are 'engaged in commerce *or in the production of goods for commerce,*'" but that "the larger considerations of national policy, legislative history, and administrative practicalities * * *" must govern the judicial construction of Section 3(j) (316 U.S. at 520, 523, 526, emphasis added). Other "production" decisions had emphasized the national social purposes of the Act and the broad statutory coverage definitions, which were plainly designed to achieve the "[b]readth of coverage * * * vital to its mission" and must be construed by "practical judgment" not by any "hard and fast rule" (*Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 665). *Kirschbaum's* covering of employees of an independent company furnishing building space and maintenance to interstate producers, and *Roland's* covering of employees of an independent enterprise engaged in repairing and reconstructing motors for use in the production of goods for commerce, rested on the ground that the work of the employees had a "close and immediate tie with the process of production for commerce" and was "an essential part of it" (316 U.S. at 525–526; 326 U.S. at 665; see also *Callus*, 325 U.S. at 584)—a test which is virtually identical to the "closely related * * * directly essential" language of the 1949 Amendments, *infra*, pp. 44–46, 49–53, 82–83. And, since *Vollmer*, the Court has reemphasized this

"practical test" for coverage. *Mitchell* v. *Lublin, McGaughy & Associates,* 358 U.S. 207, 212 (involving "in commerce" coverage), *supra,* pp. 26–27.

As we have already indicated, the teaching of this line of decisions is that in determining "production" coverage, no less than "in commerce" coverage, the "pertinent inquiry is *not* whether 'new construction' is interstate commerce under the test" of the earlier Federal Employers' Liability Act cases (see *Southern Pacific Co.* v. *Gileo,* 351 U.S. 493, 499; emphasis added), but, rather, whether the relationship of the work to the "end [interstate] product" (see *Lublin,* 358 U.S. at 212) is such as to bring it within the broad purposes, and the equally broad statutory coverage definitions, of this modern social legislation.[16]

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[16] The interpretative bulletin on coverage of the construction industry issued in July 1956 and currently in effect (29 C.F.R. Part 776, Subpart B), on the basis of the *Vollmer* and *Kirschbaum* decisions, states the administrative position to be that "Under either of the two prescribed areas of covered work, coverage cannot be determined by a rigid or technical formula" but that "both phases * * * must be given 'a liberal construction' determined 'by practical considerations, not by technical conceptions' "; that the "new construction" concept would not serve as a reliable test for determining coverage; and that "[s]o far as construction work specifically is concerned, the courts have cast the relevant tests for determining the scope of 'in commerce' coverage in substantially similiar language as they have used in construing the 'production' phase of coverage" (*id.,* Section 776.22). "Coverage of any construction work, whether new or repair work, depends upon how closely integrated it is with, and how essential it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is 'new construction' nor the fact that it is physically separated from an existing covered plant, is determinative" (*id.,* Section 776.26).

2. Assuming for purposes of argument that the "new construction" doctrine is still with us, then we say, in the language of this Court in *Lublin*, "[w]hatever vitality the 'new construction' doctrine retains after *Mitchell* v. *Vollmer & Co., supra*, and *Southern Pacific Co.* v. *Gileo* [*supra*], it is not applicable here because, as the record shows, [the project] involved the repair, *extension, or relocation of existing facilities*" (358 U.S. at 213; emphasis added).

The Fifth Circuit's extension of this technical doctrine to exclude from the Act's coverage work projects for "extension, or relocation of existing facilities" is difficult to understand. For, long before *Lublin*, it had been firmly established, even in the Fifth Circuit, that the repair, extension, or relocation of existing structures serving interstate commerce or production of goods for such commerce was covered by the Act. Thus this Court in *Vollmer* relied explicitly on the ground that "the work of improving existing facilities of interstate commerce" (which would include construction of the new lock as "part of the redesigning of an existing facility") "falls in the same category" as "[r]epair of facilities of interstate commerce." 349 U.S. at 429–430. And, significantly, the Senate Conferees, in explaining the scope of the "closely related" and "directly essential" language of the 1949 amendment to Section 3(j), similarly had placed in the same category of employees ("who would remain covered") "[e]mployees [engaged in] repairing, maintaining, *improving or enlarging* the buildings, equipment, or other facilities of producers

of goods" (95 Cong. Rec. 14874–75; emphasis added), *infra*, p. 46.

As the Eighth Circuit has pointed out, this holding of *Vollmer* "is not a change in the law"; it "has been true ever since the [Fair Labor Standards Act] was passed in 1938" that "the 'new construction rule' is not applicable to the *repair or replacement of existing facilities*". *Chambers, supra*, 233 F. 2d at 721 (emphasis the court's). Passing by (as unnecessary for decision) the question whether the "new construction" doctrine has survived *Vollmer*, the Eighth Circuit concluded that *Vollmer* only confirmed for the "in commerce" field the principle theretofore administratively and judicially established with respect to the Act's coverage generally. 233 F. 2d at 721–722. Contrary to the Fifth Circuit's assumption that "replacement-improvement" projects were recognized as noncovered "original construction" by the pre-1949 administrative Interpretative Bulletin (Wage and Hour Interpretative Bulletin No. 5, Dec. 2, 1938, revised Nov. 1939), and by the pre-1949 "original construction" court decisions (R. 97), the Eighth Circuit correctly pointed out that "the words 'original construction' in the interpretative bulletin contemplated a different situation than replacement or repairs * * * thus making reliance on that bulletin in this instance ill-advised" (233 F. 2d at 722).[17] See, *infra*, p. 41, fn. 20.

[17] Moreover, the 1939 Bulletin, on which the Fifth Circuit relied, had been expressly superseded and replaced more than 2 years prior to the 1949 Amendments by an interpretative bulletin issued in July 1947, which omitted the "original construction" paragraph entirely (12 F.R. 4583).

The Tenth Circuit, in a pre-*Vollmer* decision, had similarly expressed the view in its *Chambers* case that the "new construction" doctrine was inapplicable to the construction of the new reservoir and chlorinator house since it was "an addition to or an enlargement of an existing water system to meet its expanding needs" (214 F. 2d at 517).

Numerous other cases, before and after *Vollmer*, are to the same effect, many in the Fifth Circuit itself. In *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380 (C.A. 5), that court, citing *Vollmer*, upheld coverage of the construction of a new building designed to house a radio and television station, on the ground that the radio station when installed would replace an existing radio station operating at another site a mile away. The fact that "radio broadcasting had long been carried on," the court held, "removed [the construction of the new building] from any status of naked 'new' construction for an activity not yet in being." The new building (even though designed, also, to house a new television station not previously in existence) "was therefore an improvement of an existing facility—an operating radio station—and hence, in any vintage, was within the Act. * * * *Vollmer* * * * made it doubly sure" (*id.*, at 384). Similarly, in *Archer* v. *Brown & Root, Inc.*, 241 F. 2d 663, the Fifth Circuit held covered the construction of a plant to produce materials for the construction of a causeway, because the causeway, though "physically isolated by considerable distance from the established facilities of which it was to be a functional part,"

would "when completed * * * serve as an important, definite addition to, or improvement of, existing [interstate highway] instrumentalities" (*id.*, at 667). And, again, in *Mitchell* v. *Empire Gas Co.*, 256 F. 2d 781, the court, in upholding coverage of construction of new jet fuel storage tanks on an old abandoned airfield which was being converted into a greatly enlarged modern Air Force base, expressly stated: "[W]e do not need to determine whether the new construction doctrine has been repudiated * * * [where the] construction employees were engaged in the repair, reconstruction and extension of an existing instrumentality of commerce" (*id.*, at 784).[18]

Thus, the proposition that the enlargement of an existing facility is not excluded from coverage as

[18] Accord: *Mitchell* v. *Brown*, 224 F. 2d 359, 363 (C.A. 8), holding that the preparation of plans and specifications for the paving of streets and the enlargement of a power plant of a railroad was not excluded as "new construction" work because it was directed to the "repairs, alterations, additions and improvements to existing facilities"; *Walling* v. *McCrady Construction Co.*, 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785, holding the "new construction" doctrine to be inapplicable to construction of new buildings, machinery, and facilities to replace, improve or enlarge existing production facilities; *Mitchell* v. *Singstad & Baillie*, D. Md., September 28, 1959, 14 WH Cases 314 (not yet officially reported), ruling that the "new construction rule offers no shelter" for employers engaged in constructing a harbor tunnel "intended to serve as an important, definite addition to or improvement of existing identifiable instrumentalities" of highway traffic (*id.*, at 319); *Mitchell* v. *Southwest Engineering Co.*, 170 F. Supp. 310 (W.D. Mo.), coverage not raised on appeal, 271 F. 2d 427 (C.A. 8), construction of buildings which when completed would be used to house aviation control equipment.

"new construction" has been firmly established even in the Fifth Circuit, and the decision below does not take express issue with it as a general principle. The decision relies heavily, however, on *Murphey* v. *Reed,* 335 U.S. 865, and other pre-*Vollmer* "original construction" decisions (see *infra,* p. 41, fn. 20), in concluding that a different standard should be applied in cases—especially construction cases—dealing with "production for commerce" coverage.

3. We do not believe that *Murphey* v. *Reed* warrants such a different reading of the Act's "production" coverage. That short *per curiam* order (by a closely divided Court) gives no explicit indication of its grounds; it was issued before the question of the applicability of the "new construction" doctrine to this Act had been directly or adequately presented for judicial consideration; and the summary disposition of that employee suit was in a context confused and overshadowed by an inadequate record and many other issues.[19] *Vollmer's* characterization of *Murphey* v. *Reed,* as involving "the building of a Navy base, not the improvement of a facility or an instrumentality of

[19] As the Fifth Circuit itself noted in its second decision in *Murphey*, after remand, "many complex, important additional matters" were "not reached or passed on" by this Court's *per curiam* order (232 F. 2d 668, 671). Also, in its earlier opinion the Fifth Circuit had pointed out the inadequacy of the record, stating that the material facts had to be "dredged up from the record which [was] in many respects vague and uncertain," and plaintiffs had "wholly failed to discharge their burden of proving" the connection of their work with interstate commerce (168 F. 2d 257 at 259, 261).

interstate commerce" (349 U.S. at 430, fn. 2), has admittedly left some area of doubt as to "[w]hatever vitality the 'new construction' doctrine retains" (see *Lublin, supra,* 358 U.S. at 213), but as applied to the present case the Fifth Circuit's reading of *Murphey* v. *Reed* is inconsistent, at the least, with the *Lublin* ruling that the doctrine "is not applicable * * * [to] projects involv[ing] the repair, extension, or relocation of existing facilities" (*ibid.*).[20] And as the Tenth Circuit said, in distinguishing construction of a multipurpose dam and reservoir project from decisions like *Murphey* v. *Reed:* " * * * this is not new construction in the sense that a new building for the manufacture of goods for commerce is new construction. * * * It does not follow from the mere construc-

[20] The "new construction" doctrine had been judicially held inapplicable, prior to the 1949 Amendments, to "new construction" of buildings, machinery and facilities designed to replace, improve or enlarge existing production facilities in *Walling* v. *McCrady Construction Co.*, 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785 (Nov. 25, 1946), approved by Congress, *infra*, p. 46.

All of the pre-1949 decisions relied upon by the Fifth Circuit below rested on the ground that solely "original construction," as distinguished from improvements, replacements and extensions of existing facilities, was involved (*e.g.*, *McDaniel* v. *Brown & Root*, 172 F. 2d 446, 471 (C.A. 10), on which the Fifth Circuit placed main reliance, specifically distinguished "work of repairing an existing building or facility or in constructing replacements of, or additions to, an existing building or facility"; similarly, *Kelly* v. *Ford, Bacon & Davis*, 162 F. 2d 555 (C.A. 3), specifically distinguished the type of "extension of current facilities" involved in the *McCrady* case; see also this Court's reference in *Vollmer* (349 U.S. at 430), distinguishing the construction work in *Murphey* v. *Reed*, 335 U.S. 865, from "work of improving existing facilities of interstate commerce").

tion of such a building that it ever will have connection with commerce or be dedicated to the production of goods for commerce. It could, after its construction, be dedicated solely for intrastate commerce, if its owners deem such use advisable" (see *Tobin* v. *Pennington-Winter Construction Co.*, 198 F. 2d 334, 336, certiorari denied, 345 U.S. 915). As in *Pennington-Winter*, there is no question here that the dam and reservoir project, by its mere construction, becomes unavoidably dedicated to the substantial functioning of interstate instrumentalities and interstate production facilities, and is so designed in size and location that it is certain not to be "dedicated solely for intrastate commerce."[n]

4. The Fifth Circuit's other assumption that the "production" phase of coverage is to be more narrowly construed, at least for construction cases, than the "in commerce" phase, is contrary to the previously settled view that "the phrase 'production for commerce' is 'obviously' more flexible and more inclusive than the phrase 'engaged in commerce.'" *Tobin* v. *Johnson*, 198 F. 2d 130, 133 (C.A. 8), certiorari denied, 345 U.S. 915, quoting from this Court's opinion in *Armour & Co.* v. *Wantock*, 323 U.S. 126, 131; see also *Union Nat. Bank of Little Rock, Ark.* v. *Durkin*, 207 F. 2d 848, 852 (C.A. 8); *Tobin* v. *Girard Properties*,

[n] It seems quite likely that *Murphey* v. *Reed* was regarded as involving only the initial construction of buildings, barracks, mess halls, warehouses, recreation halls and similar installations appropriate for a temporary encampment, which might or might not be dedicated to interstate use, depending on the exigencies of war.

206 F. 2d 524, 526–527 (C.A. 5). See also *supra*, pp. 29–31. While the *Armour* decision antedated the 1949 Amendments to the "necessary"-to-production language,[22] it is clear that the amended language did not so narrow the previous scope of "production" coverage as to effect the result reached by the Fifth Circuit here—as has been recognized by the post-1949 decisions cited *supra*, and is evident from the legislative history of the amendment (discussed *infra*, pp. 44–46, 49–53).

Indeed, the Fifth Circuit itself, in its post-1949 *Girard* decision, *supra* (decided in August 1953, by a different panel) relied upon its "clear understanding that the courts have established a different and *much narrower standard for 'in commerce' coverage* than for 'production of goods for commerce' coverage," in holding employees not to be engaged "in commerce." In another post-1949 decision (*Mitchell* v. *Empire Gas Engineering Co.*, 256 F. 2d 781, June, 1958), it ruled that "[t]he differences between production of goods for commerce and the engaging in commerce are not such as to exclude the latter from the rationale of the Powell [*Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497] decision," referring to *Powell's* reliance on the "purpose of the Act * * *

[22] As amended by c. 736, 63 Stat. 910, Section 3(j), *infra*, p. 82, provides that an employee shall be deemed to have been engaged in the production of goods if [he] was employed in producing * * * [handling], transporting, or in any other manner working on such goods, or in any *closely related process or occupation directly essential* to the production thereof * * *" (emphasis added). Before the amendment the italicized words read: "process or occupation necessary."

not to regulate interstate commerce as such, but to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation" (256 F. 2d at 783).

As we have pointed out (*supra*, p. 29 *ff.*), the rationale of *Vollmer* and *Lublin, supra*, like that of *Powell*, goes to the coverage of the Act generally; it has no special relation to the "in commerce" branch, being based upon the express premises that the Act's coverage must be given a "liberal construction" and must be determined by "practical considerations, not by technical conceptions". (*Vollmer*, 349 U.S. at 429). The principle that the Act's coverage must be liberally construed is as true of one branch as for the other, and no plausible reason appears why "practical considerations," not "technical conceptions," should be the exclusive criteria of determination in one branch, but not in the other. Specifically, there is nothing in the statutory text, or the legislative history, or the factual context relating to the two branches, to exclude from the Act's coverage the improvement and enlargement of facilities directly and vitally related to the "production" of goods for commerce while including such improvement and enlargement of facilities similarly related and essential to engagement "in commerce."

Moreover, the legislative history of the 1949 amendment to the "production" language clearly contradicts the premise of the decision below that the amendment radically narrowed the scope of "production" coverage in relation to "in commerce" coverage. As stated by the chairman of the House Committee:

"The amended section gives the courts a more specific guide as to the intention of Congress; it does not, however, radically revise the coverage of the act as it has been interpreted by the courts in the past" (95 Cong. Rec. 14942, October 18, 1949). Similarly, the Statement of the Majority of the Senate Conferees pointed out that the language was not intended to substantially change or limit the decisions construing the prior "necessary"-to-production language, but rather to "provide more certainty in this field," and specifically stated that the amended language "adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage" (95 Cong. Rec. 14874). "This [amendatory] language," the Senate report continued, "is descriptive of activities which, although not an integral part of the productive operations, have a relationship to production which may reasonably be considered close as distinguished from remote and tenuous" and "contemplates activities which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of operations which are part of an integrated effort for the production of goods" (*ibid.*). These general statements of legislative purpose, as is more fully indicated *infra* (pp. 49–53), were supplemented by a detailed list of specific "typical" classes of employees and specific court decisions which would remain unchanged under the amended language.

In particular, the Senate report confirms the view of the Eighth and Tenth Circuits in the *Chambers* cases, *supra,* that the work of improving facilities for production of goods, by extensions or replacement, "falls in the same category" as repair and maintenance and is covered by the Act (*cf.* the reasoning of *Vollmer and Lublin, supra,* p. 36). See also *infra,* pp. 49–53. In its specification of (95 Cong. Rec. 14874) "typical * * * classes of employees whose work is closely related and directly essential to production, within the meaning of section 3(j) as amended," the Senate report included:

> 2. Employees repairing, maintaining, *improving or enlarging* the buildings, equipment, or facilities of producers of goods" [95 Cong. Rec. 14875; emphasis added],

without differentiating repair and maintenance from construction of improvements and enlargements, and specifically citing with approval not only such maintenance and repair work decisions as *Kirschbaum, Borden,* and *Roland, supra,* but also *Walling* v. *McCrady Const. Co.,* 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785, in which coverage of employees engaged in the construction of extensive new buildings, machinery and facilities, designed to improve, enlarge or replace existing production facilities, had been upheld. The 1949 Congress thus indicated that the "new construction" doctrine was not to apply to improvement or enlargement of existing facilities.

AUTHORITATIVE JUDICIAL AND CONGRESSIONAL MATERIALS CONFIRM THE ACT'S COVERAGE OF THIS CONSTRUCTION WORK

Putting aside the erroneous view that the "new construction" doctrine supplies a special rule for this case, it is clear that coverage is supported by the prior judicial and legislative holdings, both because this construction is "closely related" and "directly essential" to the production of goods for commerce, and also because it involves the actual production of goods themselves in the primary sense.

1. Under the authorities, the work is "closely related" and "directly essential" to the production of goods for commerce

(*a*). There is no dispute that, if respondent's construction employees were merely engaged in the maintenance and repair of the pre-existing facilities of the Corpus Christi water system, they would be within the Act's coverage. For it has long been settled by a consistent line of decisions, both before and after the 1949 Amendments, that employees engaged in repair and maintenance of the facilities and equipment of a utility company supplying essential fuel, power, *water,* etc. to interstate instrumentalities and interstate producers are engaged in "production of goods for commerce," within the secondary meaning of Section 3(j). See, in particular, *McComb* v. *Farmers Reservoir & Irrigation Co.,* 167 F. 2d 911 (C.A. 10) (upholding coverage of employees engaged in maintenance and repair of the reservoirs and canals of an irrigation company supplying water essential to the growing of sugar beets, corn and peas, for eventual interstate shipment after being refined or canned, re-

spectively, by sugar refineries and canneries within the same State), affirmed with modifications including clerical workers, 337 U.S. 755;[23] *Reynolds* v. *Salt River Valley Water Users Ass'n,* 143 F. 2d 863 (C.A. 9), certiorari denied, 323 U.S. 764 (same holding with respect to repair and maintenance employees of equipment of irrigation company supplying water for growing of crops intended for shipment in interstate commerce); *Meeker Cooperative Light & Power Ass'n* v. *Phillips,* 158 F. 2d 698, 699 (C.A. 8), affirming and explicitly approving the district court's holding of coverage of construction workers engaged in repair and maintenance and "new construction" of electric lines for a rural electric cooperative which furnished a relatively small proportion of its power supply, but regularly, to some creameries, hatcheries and other pro-

[23] This Court, in affirming, stated that the Court of Appeals had "quite properly" applied the "close and immediate tie" standard of the *Kirschbaum*, *Armour* and *Roland* decisions (*i.e.*, the standard explicitly approved by Congress at the time of the enactment of the 1949 Amendments, see *supra*, pp. 44–46) to hold that the field employees were "engaged in an occupation necessary, in the statutory sense, for the production of agricultural commodities shipped in commerce" (337 U.S. at 759), and that indeed the word "'[n]ecessary' understates the case," since "[t]he water supplied by the company's employees is, in this case, an indispensable prerequisite for agricultural production * * *. Under such circumstances, there can be no doubt of the immediacy of the connection between the production, by the farmers, for commerce and the work of the company's field employees in providing water for irrigation" (*id.* at 759). The Court then further held that this ruling was "equally applicable to the bookkeeper" since "his work is a necessary part of the operation of the company's water supply system," so that it "follows that his case is on all fours with that of the field workers" (*id.* at 770).

ducers some of whose products were eventually shipped out of the State (see 63 F. Supp. 733 at 739).[24]

(*b*). That the 1949 amendment to Section 3(j) was not intended to limit this well-settled area of coverage

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[24] See also *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751, 753 (C.A. 5) (holding that guards employed to protect the property of an electric company, among whose customers were interstate instrumentalities and establishments manufacturing and mining goods for shipment outside the State, were "just as vital to the interstate activities of defendant's customers as the repair of electrical motors was to the employer in the *Roland Electric Co.* case [*Roland Co.* v. *Walling*, 326 U.S. 657]"; *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (C.A. 6) (employees, including those engaged in maintaining or guarding the equipment, of a coal company furnishing substantial quantities of coal to concerns for use in the manufacture of goods for commerce, held covered).

Accord: *Mitchell* v. *Mercer Water Co.*, 208 F. 2d 900 (C.A. 3); *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C.A. 10); *Davila* v. *Porto Rico Ry. Light & Power Co.*, 143 F. 2d 236 (C.A. 1); *Williams* v. *Wisconsin Electric Power Co.* (employees engaged in "construction, maintenance, repair and servicing" of power company's generating plants and other facilities), 3 W.H. Cases 750; 9 Labor Cases, para. 62,033 (not officially reported) (Cir. Ct. Wisc. 1943); *Larsen* v. *Dakota County Electric Co-op.* (employees engaged in "construction, extension, maintenance and repair of defendant's electrical power lines"), 7 W.H. Cases 229; 13 Labor Cases, para. 63,989 (not officially reported) (D. Minn. 1947); *Allen* v. *Arizona Power Corp.* (line and gas main repair and maintenance men), 4 W.H. Cases 355; 7 Labor Cases, para. 61,959 (not officially reported) (D. Ariz. 1943); *Phillips* v. *Anoka County Co-op Light Assn.* (outside maintenance men), 7 W.H. Cases 9; 12 Labor Cases, para. 63,577 (not officially reported) (D. Minn. 1947); *Richardson* v. *Delaware Housing Assn.* (guard protecting generating equipment) 3 W.H. Cases 278; 7 Labor Cases, para. 61,583 (not officially reported) (S.D. Fla. 1943); *Armstrong* v. *United Illuminating Co.* (guard), 7 W.H. Cases 109; 13 Labor Cases, para. 63,881 (not officially reported) (Sup. Ct. Conn. 1947).

was explicitly made clear in the comments explaining the purpose of that amendment. Not only did the Conferees' reports in both Houses expressly state, in direct contradiction to the assumption of the court below, that the legislative purpose was *not* substantially to change or limit the decisions construing the prior "necessary"-to-production language (see *supra*, pp. 44–46), but the specific decisions most pertinent to the instant case were affirmatively approved. Thus, the Senate report, in a detailed list of "typical" employees "performing tasks necessary to effective productive operations of the producer," who would remain within the Act's coverage, not only included employees engaged in "[p]roducing and supplying fuel, power, *water*, or other goods for customers using such goods in the production of different goods for interstate commerce," but approved specifically the above cited decisions in the *Reynolds, Meeker Cooperative, Lewis,* and *West Kentucky Coal Co.* cases (95 Cong. Rec. 14874–75; emphasis added).[*] See also the House Managers' report, which, while not so detailed regarding the extent to which prior judicial interpretation of "production" coverage would remain intact, also confirms the limited nature of the change, expressly stating that the amendatory language would "not affect the coverage

[*] In addition to the specific legislative approval of the *Reynolds* decision, the Congressional acceptance of the coverage rulings in both *Reynolds* and *Farmers Reservoir* (*supra*, pp. 47–48) was clearly indicated by its enactment in the 1949 Amendments of a special, carefully limited, exemption for employees "employed * * * in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways * * * which are *used exclusively for supply and storing of water for agricultural purposes*" (Section 13(a)(6); emphasis added).

* * * of employees who repair or maintain buildings in which goods are produced for commerce" (citing *Kirschbaum*), or employees "who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce" or "employees of public utilities, furnishing gas, electricity *or water* to firms within the State engaged in manufacturing, producing, or mining goods for commerce," all of whom "will remain subject to the act" as "doing work that is closely related and directly essential to the production of goods for commerce" (95 Cong. Rec. 14929).

The specific affirmation by both the Senate and House reports that employees of independent electric, gas and *water* utility companies, and of independent producers of "tools, dies, designs, patterns, machinery * * * or other equipment used by purchaser in producing goods for interstate commerce" would remain "covered as closely related and directly essential to such production" (95 Cong. Rec. 14874–75, 14929) contradicts the Fifth Circuit's view that Congress intended to expand the class of non-covered "local enterprises" (R. 96) so as to exclude from the Act's coverage work plainly designed to furnish equipment or facilities needed and used by producers of goods for commerce directly in their productive processes.[26]

[26] In particular, it is clear that Congress did not intend to expand the "local enterprise" concept of *Callus* (see *infra*, pp. 53–56) so as to exclude from the Act the wide variety of businesses which regularly supply essential utilities and materials to (among miscellaneous other customers) interstate instrumentalities and producers of goods for interstate com-

As we have said, from any practical and realistic viewpoint, the construction of adequate water supply facilities designed to replace and improve, without interruption of service, the water supply currently and substantially devoted to furnishing the water admittedly essential to and used directly in the productive processes of producers of goods for commerce, can hardly be regarded as any more "local" or "isolated" and "remote" from such production than the local manufacture and sale of tools, machinery

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merce. This is evident from the explicit statement that employees of utility companies and of suppliers of tools and materials, etc. would remain within the Act's coverage (see *supra*, p. 51), and from the specific approval of such decisions as: *Roland*, *supra*, p. 46, (an independent electrical contracting company serving, *inter alia*, 33 industrial customers—out of a total of approximately 1,000—who were engaged in interstate commerce or the production of goods for commerce); *Lewis* v. *Florida Power & Light Co.*, *supra*, p. 50, (an electric company regularly furnishing a relatively small proportion of its electricity for use in operating railroad signal lights and airport beacons); *Meeker Cooperative Light & Power Company Ass'n*, *supra*, p. 50, (a power company among whose regular customers were some interstate instrumentalities and interstate producers), *West Kentucky Coal Co.*, *supra*, p. 50, (a coal company among whose customers were some interstate producers). See also *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C.A. 5), and other "ice company" cases (cited with approval in this Court's *Alstate* decision, 345 U.S. at 16, n. 4)—supplying ice, *inter alia*, to fruit shippers and railroads for refrigerating freight cars; *Tobin* v. *Johnson*, 198 F. 2d 130 (C.A. 8), certiorari denied, 345 U.S. 915 (an independent materialman regularly supplying some of its crushed stone and other materials for use in repair and maintenance of roads).

In all of these cases, coverage has been sustained by reason of the fact that among the general miscellany of customers were some interstate instrumentalities and interstate producers who had regular and substantial need for such utilities or materials.

or other equipment designed for similar use in the productive processes."

(*c*). The Fifth Circuit's reliance on *10 East 40th St. Co.* v. *Callus*, 325 U.S. 578, reflects its misapprehension of the legislative intent—probably resulting from its erroneous view that "[r]eference need not be made to Committee reports or other aids by way of legislative history" to determine "the class of employees to be considered engaged in local enterprises"

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[27] The situation here bears little resemblance to the examples of "local enterprise" cited by Congress to illustrate activities which would *not* be covered under the changed language of the 1949 amendment to Section 3(j). See the examples cited in the Senate report—*i.e.*, "the procurement of land for a new factory or the manufacture of brick for its buildings," or "employees of a local real estate firm renting apartments or dwelling houses to tenants, some of whom are employees of a factory producing goods for interstate commerce" (as distinguished from "employees engaged in operating or maintaining living facilities for employees of a producer of goods for interstate commerce, in situations where living facilities such as food and lodging are provided as a means of assuring continued and efficient production," which, it was expressly stated, would remain covered) (95 Cong. Rec. 14874). It is evident that the amendatory language was viewed by the Majority Senate Conferees simply as a measure to counteract the fears or possibility that it "might be argued" that coverage extended to such "remote or tenuous situations," since "[t]he definition in the present act provides no clear cut-off preventing *extension* of the coverage of the Act" to such extremes (*ibid.*; emphasis added).

The House Conferees' examples of situations to be excluded from coverage, although somewhat less "remote or tenuous" than the Senate examples, are, also, clearly distinguishable (having considerably less direct and vital relationship to the interstate manufacturer's processes) from the circumstances of the instant case—*i.e.*, "a local independent nursery concern" whose business might include "mowing the lawn around the plant of a customer * * * engaged in producing goods for in-

(R. 96).[25] The employer there was the owner and operator of a rental building, in which office space was leased to a miscellany of tenants for administrative and clerical non-manufacturing activities. In ruling that the building maintenance employees in these circumstances were not covered by the Act, the Court emphasized that this enterprise was exclusively on of "[r]unning an office building," and that the happenstance that "some proportion of the offices in the building may, for the time being, be [the administrative or sales] offices of manufacturing enterprises" engaged in physical production of goods elsewhere—*in other buildings not maintained by the activities of the employees in question or their employer*—had too remote and "attenuated" a relationship to such tenants' production of goods for commerce to modify the "local" nature of the business (325 U.S. at 581, 583). Significantly, the Court expressly reaffirmed both *Kirschbaum, supra,* and *Borden Company* v. *Borella*, 325 U.S. 679 (decided the same day as *Callus*), which made it clear that maintenance work on a building that provides tenants with space needed for

terstate commerce," and a similar "local exterminator service firm" or "local architectural firm," employes of "a local window-cleaning company" such as were held covered in *Martino* v. *Michigan Window Cleaning Company*, 327 U.S. 173, and of "a local fertilizer company" such as were held covered in *McComb* v. *Super-A Fertilizer Works*, 165 F. 2d 824 (C.A. 1). (95 Cong. Rec. 14929.)

[25] The importance of the legislative history in construing this Act and its amendments has been repeatedly emphasized by this Court. See *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290; *Alstate Construction Co.*, v. *Durkin*, 345 U.S. 13; *Mitchell* v. *King Packing Co.*, 350 U.S. 260; *Steiner* v. *Mitchell*, 350 U.S. 247; *Mitchell* v. *Bekins Van & Storage Co.*, 352 U.S. 1027.

their physical manufacturing operations is "production" within the Act. Thus, *Callus* would be applicable here only if the industrial users of water in Corpus Christi were limited to some administrative offices of producers who did all their manufacturing and processing elsewhere. This is, of course, very far from the fact (*supra,* pp. 24–28, 51–52).[29]

It is not difficult, of course, as a matter of abstract logic, to subdivide any relationship of cause and effect into a series of intermediate steps by making finer conceptual analyses. But the fallacy of inferring "close[ness]" or "remoteness" by a process of "dialectical progression"[30] (counting the "step[s] physically removed," see opinion below, R. 98) is well demonstrated by *Borden, supra,* one of the decisions specifically approved by Congress at the time of the 1949 Amendments. A main argument of Borden was that the maintenance employees of the New York building

[29] In marked contrast to the instant case, there was no evidence in *Callus* that the maintenance of the building had any direct or essential or regular relationship to the functioning of any particular interstate instrumentalities or interstate production. And, even on the "thin" evidence in *Callus*, the Court found the question of coverage to be a very close one (the decision being by a closely divided Court).

Clearly, respondent Zachry's business as a whole, in contrast to the *Callus* enterprise, cannot qualify as a "local enterprise," by any stretch of the imagination, since the bulk of its work (over 96% during the past three years of a total of 178 jobs, and almost 85% of a total dollar volume of over $77 million) is concededly of an interstate character subject to the Fair Labor Standards Act, including highways, railroads and power lines, as well as water systems (R. 90–91; Gov't. Exh. I—Answer to Interrogatories VIII).

[30] See the opinion of Judge Learned Hand in *Borella* v. *Borden*, 145 F. 2d 63, 64–65, affirmed, 325 U.S. 679.

were too remote from production of goods for commerce because their activities related only to the administrative and clerical employees and therefore they were "twice removed" from production (see Pet. Br. in No. 688, October Term 1944, p. 11). This Court, rejecting that argument, ruled that, in the practical "economic sense," since Borden's "operation and maintenance of a central office building is essential to the economy, efficiency and continuity of production," these maintenance employees "stand in the same relation to this production as did the maintenance workers in the *Kirschbaum case*" (325 U.S. at 683, 684). At the practical economic level, the significant fact in the instant case is that the construction of the dam directly brings into being the accumulation of water essential to the efficiency and continuity of production by the industrial enterprises served by the Corpus Christi water system. In the absence of the dam, there would not be water in the quantities "direly needed" for the current and rising level of industrial, as well as domestic, requirements. This is *the* "practical consideration" for which this important dam was built.[31]

(*d*). In the proceedings below, and in its brief in opposition to the petition for certiorari, respondent contended also that the construction here was too remote as "a matter of geography" and as "a matter of contractual connections" (Brief in Opp., p. 12).

[31] At the time of the 1949 Amendments, neither the Senate nor the House reports made any reference to the *Callus* decision, and there is clearly no indication that Congress intended to use *Callus* as a mandate to broaden the class of "excepted occupations." See *supra*, pp. 51, 53, fns. 26, 27.

These are clearly irrelevant "technical conceptions." The fact that the water flows 42 miles through the mains before it reaches the city, on which respondent bases its theory of "remoteness" by "distance" (Brief in Opp., pp. 12–16), has of course no practical bearing on the relationship of the activities in question to the production of goods for commerce. The dam, we may assume, is no further out than was found necessary to supply an amount of water sufficient for the city's needs. If local industrial and topographical conditions combine to require a 42-mile water line from source to customer, then the beginning of that water line cannot be considered remote in any pertinent sense. That the geographical distance of the activity from the production of goods for commerce (see Brief in Opp., p. 12) is no criterion of the Act's coverage was long ago settled by *Borden, supra,* upholding the coverage of maintenance employees in Borden's New York central office building (although considerably more "geographically divorced from the manufacturing plants," 325 U.S. at 681) by reason of the relationship of the management and administrative services furnished from the New York office to the physical production carried on in the various distant Borden plants, throughout the United States and Canada.

Moreover, regardless of the length of the existing water line which will connect the enlarged reservoir with the industrial plants, the essential fact is that the work was performed at hardly any distance from the facilities which now serve the plants and which are to

be expanded or replaced as a result of the work. The new dam, as has been noted, is some 1400 feet downstream from the existing dam and the reservoir; and the new reservoir is designed to inundate the older facilities without interruption of service to consumers (see the Statement, *supra*, p. 5).[32]

Respondent's theory of remoteness in "contractual connection" between respondent's employees and the industrial consumers of the water (Brief in Opp., p. 13), although urged below, was so clearly untenable that it was not relied on by the Court of Appeals. Respondent ignores the settled principle that coverage under the Fair Labor Standards Act is determined not by the way in which the employer carries on his business, but by the character of the employees' activities. See *Kirschbaum, Vollmer* and *Lublin, supra*. As is evident from these and many other decisions, the essentiality or closeness of the employees' operations to production for commerce does not depend on contractual relationships of their employers, but on the functional realities. The employer in *Vollmer* was an independent contractor under contract to construct only portions of the guide levees which could not become part of the waterway until other guide levees and the dredging of the canal had been completed by other contractors, and clearly Vollmer had no contractual or business relationship with the users of the

[32] See also the Fifth Circuit's recognition of the irrelevance of "remoteness in distance" in decisions dealing with "in commerce" construction projects (*supra*, pp. 38–39).

canal; nor did the Lublin company have any closer "contractual connection" with the users of the roads, airfields, etc., constructed by other independent contractors pursuant to Lublin's plans and specifications.[33]

The irrelevance of such "contractual connection" was expressly recognized in the legislative reports on the 1949 Amendments, which, after listing the employees whose work would remain covered by the amended language (see *supra*, pp. 46, 50–51), added explicitly: *"whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer"* (Senate Conferees' report, 95 Cong. Rec. 14875; emphasis added)—*"notwithstanding they are employed by an independent employer* performing such work on behalf of the manufacturer, mining company, or other

[33] Similarly, *Pedersen* v. *J. F. Fitzgerald Const. Co.*, 318 U.S. 740, involved employees of an independent contractor constructing new abutments under two railroad bridges upon which the railroad itself subsequently lowered the tracks; *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. 2d 334 (C.A. 10) certiorari denied, 345 U.S. 915, involved employees of an independent contractor performing reservoir clearance work preliminary to work performed by other contractors who would subsequently construct and place into operation a new multiple-purpose dam; *Walling* v. *McCrady Const. Co.*, 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785, involved employees of an independent contractor constructing foundations for new facilities to be erected by other contractors; and *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (C.A. 4), involved an employee constructing a bridge which would be connected with the highway by a road to be constructed by another contractor.

producer for commerce" (House report, 95 Cong. Rec. 14929; emphasis added).[34]

2. Since the construction work actually produces (impounds) the water for uses essential to the functioning of interstate instrumentalities, it is direct production of "goods" "for commerce"

The statement of the Court of Appeals that the employees here "obviously * * * are not actually, while building the dam, producing any goods for commerce" (R. 93) ignores the practical engineering fact that the very construction of the dam project impounds or "produces" the water ("goods"),[35] just as

[34] It is also irrelevant that respondent's contract is with the Water District and not with the City, which is the agency that sells the water to the consumers. The supply of water is a public responsibility in the area of Corpus Christi. How this responsibility is divided among the public bodies in the area is a matter of political and administrative convenience having no bearing upon the practical functional relation of the construction activities at the Mathis Dam to the production activities of manufacturers in the city. *Cf. Durkin* v. *McCrary Co.*, 206 F. 2d 277 (C.A. 5).

[35] That water (no less than road materials, ice, coal, oil, or other fuel) is "goods" within the meaning of the Act is not open to doubt. See *Farmers Reservoir, Reynolds* v. *Salt River* and *Mercer Water Company*, *supra*, pp. 47–49. The legislative history of the 1949 Amendments confirms this beyond question, as well as the Act's continued coverage of employees of such water producers. Thus the Senate Conferees' report on the amendments specifically states that the amended Section 3(j) would cover employees "[p]roducing and supplying fuel, power, *water, or other goods* for customers using *such goods* in the production of different goods for interstate commerce" (95 Cong. Rec. 14875; emphasis added); and similarly the House report specifically states that "employees of public utilities, furnishing gas, electricity or *water* to firms * * * engaged in manufacturing, producing, or mining goods for commerce, will remain subject to the act" (95 Cong. Rec. 14929; emphasis added).

coal, natural gas and oil are captured or "produced" by digging or drilling. See *Warren-Bradshaw Drilling Co.* v. *Hall,* 124 F. 2d 42, 44 (C.A. 5), affirmed, 317 U.S. 88, 91.[35] The *Warren-Bradshaw* operations bear a striking resemblance to those here. Both have to do with the capture of a product of nature. There it was oil. Here it is water. As this Court observed in that case, "Oil is obtained only by piercing the earth's surface" (317 U.S. at 91). While water may be obtained in more than one way, it is usually obtained by constructing a dam and reservoir. The connection, therefore, between the construction of a dam and reservoir and the capture of water precisely parallels the connection between well-drilling activities and the capture of oil. Thus, if the construction employees here were not actually producing the water,

[35] The Fifth Circuit there held that the operator of a rotary drilling rig and the members of his crew, who performed the preliminary drilling of holes short of oil producing sand, "if not engaged in mining for and the production of oil, within the meaning of the act, *as actually mining and producing the oil, and we think they were,* were certainly engaged in processes or occupations necessary to the production of oil" (124 F. 2d at p. 44; emphasis added). This Court, in affirming, ruled that "[w]hether or not respondents, in drilling to a specified depth short of oil, may be regarded as engaged in producing or mining—*and we certainly are not to be understood as intimating that they may not*—recognition of the obvious requires us to hold that, *at the very least,* they were engaged in a 'process or occupation necessary to the production' of oil," *since "those activities certainly bear as 'close and immediate tie' to production as did the services of the building maintenance workers held within the Act in Kirschbaum Co.* v. *Walling* * * * " (317 U.S. at p. 91; emphasis added).

"recognition of the obvious," as in *Warren-Bradshaw,* requires the holding that "at the very least" their work meets the "close and immediate tie" test of *Kirschbaum* (see *supra,* fn. 36), which Congress expressly adopted at the time of the enactment of the 1949 Amendments (see *supra,* pp. 45–46).

Since this construction work was designed to supply water essential to the functioning of interstate instrumentalities, the workers were engaged in the production of goods "for commerce" in the same manner and degree as the workers preparing materials for use in construction of interstate highway improvements in *Alstate Construction Co.* v. *Durkin,* 345 U.S. 13, or as the employees engaged in producing ice for refrigeration of railroad cars in the "ice company cases" (see *Fleming* v. *Atlantic Co.,* 40 F. Supp. 654, affirmed *sub nom. Atlantic Co.* v. *Walling,* 131 F. 2d 518 (C.A. 5), and the other decisions cited with approval in *Alstate, id.* at 16, fn. 4). If the production of materials for use within the same state in the maintenance of stationary roads and railroad tracks is production of goods "for commerce," *a fortiori* production of water for use in the maintenance and operation of trucks and railroad cars, which themselves move across state lines, is production of goods "for commerce."

3. Some of the water may reasonably be expected to move interstate as an "ingredient" of products shipped in interstate commerce, or in use in the interstate operation of transportation facilities

The correctness of the view that construction work of the type here involved is production of goods for

commerce, within this Act's coverage, is confirmed by the further consideration—not pressed, and therefore not ruled upon, in either court below—that some of the water impounded by the construction of the dam actually moves interstate in its use in the operation of railroads or trucks, or becomes an "ingredient" of products moving in interstate commerce, and, therefore, the construction workers are engaged directly in producing "goods" for interstate transportation or shipment.[37]

As pointed out in our petition for a writ of certiorari (p. 24, fn. 16).

> * * * the District Court found that water impounded by the dam would become an "ingredient" of goods moving in interstate commerce. This finding was apparently based upon judicial notice of the water content of products manufactured by various industries in Corpus Christi. Since the Government did not undertake to present evidence that the water became an ingredient of any products [or that the water itself was transported across state lines], this was not urged below as a ground for coverage, and the trial court's final opinion, at the close of the trial on the merits, made no reference to the "ingredient" point. The Court of Appeals, in reversing the District Court's holding of coverage, clearly gave no consideration at all to the "ingredient" point [or to the point that the water itself moved interstate].

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[37] The statutory definition of "commerce" includes "transportation [and] transmission * * * between any State and any place outside thereof." Section 3(b), *infra*, p. 82.

The statutory definition of "goods" includes "any part or ingredient thereof". Section 3(i), *infra*, p. 82.

> While this ground for coverage has not hitherto been pressed in this case, we believe that the evidence in this record, supplemented by facts of common knowledge or authoritative publications properly subject to judicial notice, would make reliance upon this ground of coverage appropriate; if certiorari is granted we shall develop the point.

We deem it appropriate to advance this additional ground of coverage because the decision in this case will serve as the controlling precedent in determining coverage of employment in similar construction work to enlarge water supply facilities, which (as pointed out in the petition for certiorari (pp. 25–26)) is of considerable current and increasing importance throughout the Nation, as the fast-growing use of water by industries, utilities, and the increasing population, expands (see *supra*, p. 28, fn. 10). Inasmuch as it is a matter of common or readily ascertained knowledge that most water-supply systems for industrialized cities regularly furnish substantial amounts of water for use in the interstate operation of interstate instrumentalities (*e.g.*, railroads, trucks, ships, airplanes, etc.), and for use as an important ingredient of products shipped interstate (as well as for uses in manufacturing processes), resolution of the general coverage issue presented by this case should not, we submit, preclude consideration of this additional basis for sustaining coverage of water-system construction work.

The record here, although not developed to show the actual interstate movement of any of the water, does

show that the water system regularly supplies water to interstate railroads and trucking concerns, and "large quantities" to the major industries in the area "practically all" of which produce products for interstate sale, and that one of the major industries is production of chemicals (R. 33–37). Information in standard trade publications shows that, among the chemicals produced in Corpus Christi are caustic soda and sulphuric acid (see Directory of Texas Manufacturers, University of Texas, 1959, pp. 127–129) both of which utilize water as raw material in their manufacture. Both chemicals, moreover, are commonly shipped in solution with water, which, in the case of caustic soda, frequently comprises 50 percent of the shipped product (Glover & Cornell, The Development of American Industries, 3d ed. (Prentice-Hall), p. 427; 1 Encyclopedia of Chemical Technology, pp. 408–428; 13 Encyclopedia of Chemical Technology, pp. 458–497). The manufacture of paint, another Corpus Christi industry (see Columbia Lippincott Gazetteer of the World, *supra*), also uses water as an ingredient, twenty-five percent or more of the composition of latex and emulsion paints consisting of water (9 Encyclopedia of Chemical Technology, pp. 795–802; Payne, Organic Coating Technology (John Wiley & Sons, Inc.), pp. 372–377). In addition, several Corpus Christi concerns produce concrete (see Directory of Texas Manufacturers, *supra*), a product adaptable to a great variety of construction uses, including roads, bridges, docks and buildings (5 Encyclopedia Britannica (1959), pp. 112), and which contains water, generally comprising from 15 to 20 percent of total volume

(*Design and Control of Concrete Mixtures*, Portland Cement Association (Tenth Edition), p. 3).[**]

II

THE DISTRICT COURT'S LIMITATION OF THE INJUNCTION TO THE VIRTUALLY COMPLETED MATHIS DAM PROJECT WAS NOT WARRANTED

Although the Court of Appeals did not reach the issue presented by the Secretary's cross-appeal to that court (R. 78)—*i.e.*, whether the trial court erred in limiting injunctive relief to the single construction project which led to the institution of this suit, rather than granting an injunction restraining future violations by respondent on other projects within the Act's coverage—this question will necessarily arise if the decision below is reversed on the coverage question. This is also an issue of general importance in the

[**] Since the evidence relating to this ground of coverage was not developed in the record of the instant case, but has been fully developed in the record in the *Healy* case, *supra* (presently pending on appeal to the Seventh Circuit, No. 12777), the *Healy* record affords a more representative picture of the substantial quantities of water moving interstate as an "ingredient" of various industrial products shipped interstate, or in the course of its use by interstate instrumentalities. That record shows, for example: that railroads use large quantities of water in the boilers and tenders of steam-driven locomotives and in the cooler systems and steam generators of diesel locomotives, as well as for supplying passenger and dining cars (Healy R. 43–48); that railroads use considerable quantities of ice for freight car refrigeration and passenger train air conditioning (*id.* 34–35); that water is a substantial ingredient of many chemical products (comprising as much as 80% of some finished chemical products) (*id.* 21–23); that it comprises over 95% of beer products (*id.* 32–33); and from 25% to 30% of some paints and varnishes (*id.* 28–29).

enforcement of the Fair Labor Standards Act, and particularly in the region within the jurisdiction of the Fifth Circuit where a large proportion of the violations occur and where resort to judicial enforcement is most frequently required.

While the grant or denial of injunctive relief under Section 17 of the Act, *infra*, p. 83, is a matter within the sound discretion of the district court, clearly this discretion is not unlimited. It must be a "legal discretion, not merely the individual view or will of the particular chancellor" (see *Union Tool Co.* v. *Wilson*, 259 U.S. 107, 112; *Winchester Repeating Arms Co.* v. *Olmsted*, 203 Fed. 493, 494 (C.A. 7)), and where the requested relief is warranted by conceded or indisputable facts it must be granted "absent any recognized mitigating factor." *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 422; *Walling* v. *National Ice & Fuel Corp.*, 158 F. 2d 28 (C.A. 7).

This much has been recognized, as a matter of established general principles of equity, by most of the Courts of Appeals, and, accordingly, there have been a number of decisions reversing denials, and directing the issuance, of injunctions in cases under this Act.[39]

[39] *Lenroot* v. *Interstate Bakeries Corp.*, 146 F. 2d 325 (C.A. 8); *Tobin* v. *Anthony-Williams Mfg. Co.*, 196 F. 2d 547, 551 (C.A. 8); *Tobin* v. *Johnson*, 198 F. 2d 130 (C.A. 8), certiorari denied, 345 U.S. 915; and *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C.A. 8); *Mitchell* v. *Southwest Engineering Co.*, 271 F. 2d 427 (C.A. 8); *Lenroot* v. *Kemp*, 153 F. 2d 153, 156 (C.A. 5); *Mitchell* v. *Hausman, d/b/a Alice Meat Co.*, 261 F. 2d 778 (C.A. 5); *Walling* v. *National Ice & Fuel Corp.*, 158 F. 2d 28 (C.A. 7); *Walling* v. *Panther Creek Mines*, 148 F. 2d 604 (C.A. 7); *Mitchell* v. *Hertzke*, 234 F. 2d 183, 188–189 (C.A. 10); and *Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (C.A. 10).

However, as is illustrated by the District Court's action in the instant case, there has been considerable misapprehension of the kind of "mitigating factor[s]" which warrant the denial of injunctive relief. The standards relied upon and factors most frequently emphasized (by lower courts in the Fifth Circuit, particularly) to justify denial of injunctive relief have ignored or minimized the specific enforcement purposes the Section 17 remedy is designed to serve—to the point of seriously obstructing, rather than aiding, enforcement of the Act. It has become evident that, if the injunction remedy provided by Section 17 is to serve rather than thwart the national policies and objectives of this Act, there is a need for guiding standards which require that the emphasis be placed on the interests of the public and of the underpaid employees and complying competitors, rather than misplaced on over-solicitude for the non-complying employer who has already benefited financially from past violations and is in a position to gain similar benefits from future noncompliance while contesting and litigating other cases.

The District Court in the instant case, citing the Fifth Circuit's decisions in *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380, and *Mitchell* v. *Bland*, 241 F. 2d 808, limited its injunction to the virtually completed Mathis Dam project (thus, in effect, denying any real relief). Despite respondent's past violations on other projects (see *infra*, p. 80, fn. 50), and despite the absence of any indication that respondent would make amends for its "good faith" mistakes by restoring to

employees the substantial amounts of underpayments on the project here in issue, the District Court declined to grant an injunction restraining future violations on the grounds that respondent "has acted in good faith" in "an honest belief * * * that the project was not covered" and the court did not feel that respondent should "act at his peril" in connection with future projects (R. 76). These reasons were evidently premised on the standards announced by the Fifth Circuit in *Hodges* and *Bland, supra,* that a Section 17 injunction imposes "substantial disadvantages" on the employer "without, at the same time, giving the enforcement agency any real substantial benefit", and that "right to challenge substantial questions of coverage ought to be freely open to good faith litigation by an employer unfettered, in that process by the prospect of contempt proceedings" (238 F. 2d at 383).

In our view, this approach to enforcement of the Fair Labor Standards Act is quite wrong. As this Court pointed out in *United States* v. *Darby,* 312 U.S. 100, 122, the Fair Labor Standards Act is "directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair,' as the Clayton Act has condemned other 'unfair methods of competition' made effective through interstate commerce." Suppression of the particular type of unfair competition at which this Act is directed is peculiarly dependent upon the injunction remedy. One of the most difficult practical problems of enforcing the Act is to assure complying employers, particularly those in the highly competi-

tive industries, that their less law-abiding or less conscientious competitors will not secure or retain substantial competitive advantages by periodic or sporadic failure to pay the wages required by the statute. The injunction remedy is the only effective means of preventing a noncomplying employer from retaining permanently the financial profit and unfair competitive advantage accruing from his noncompliance. For, unlike the ordinary equitable injunction or the anti-trust injunction, the ordinary injunction remedy under this Act cannot restore the *status quo* or require "divestiture of * * * unlawfully acquired" benefits (see *Schine Theatres* v. *United States*, 334 U.S. 110, 128). This is so because Section 17, as amended in 1949, expressly deprives the courts of jurisdiction to order restitution of past unpaid wages as an incident to the original issuance of an injunction.[40] Restitution of unpaid wages can now be ordered only by way of civil contempt proceedings for violations occurring *after* an injunction has been issued. Thus, as long as a noncomplying employer is not under injunction, there is open to him the opportunity of retaining permanently the financial advantage accruing from his noncompliance, with the consequent continuing temptation to resume noncompliance and to litigate even on the most tenuous grounds.

While thus serving as the most substantial and effective enforcement measure, the continuing injunc-

[40] The power to require back pay in contempt orders was not affected by the enactment of the proviso in 1949. *Frost-Arnett Co.* v. *Tobin*, 264 F. 2d 246 (C.A. 6); *Durkin* v. *Casa Baldrich, Inc.*, 111 F. Supp. 71, 75 (D. Puerto Rico) (setting forth the legislative history on this point), affirmed, 214 F. 2d 703 (C.A. 1).

tion under this Act is a particularly mild one so far as the enjoined employer is concerned. As the Eighth Circuit recently pointed out, "[s]uch injunction imposes no new restrictions upon the employers as it forbids only what is already forbidden by statute" (*Mitchell* v. *Southwest Engineering Co., supra,* 271 F. 2d at 432). It imposes no penalties for the violations found, not even requiring restoration of the wages determined to have been unlawfully withheld. It requires no payments in the future other than the minimum wages and overtime compensation that must be paid by all employers subject to the Act. Presumably, these were the considerations which prompted this Court to remark, in *Lublin, supra,* that "[w]e fail to see what undue burden will be placed on respondent by the issuance of an injunction * * *" (358 U.S. at 214).

The plain fact is that the continuing injunction imposes no real disadvantage on an employer with good faith intentions to comply in the future. It serves as a warning order that the court will be in a position to order restoration of underpayments resulting from *future* violations. If such violations are unintentional, the employer is not subject to criminal or punitive contempt proceedings, and in civil contempt proceedings he is as free to contest controversial issues of coverage or charges of violations as he would be in an original injunction action. The "prospect of contempt proceedings," as a practical matter, implies no more (except in cases of willful or criminal violations) than that the enjoined employer will not again have the opportunity to retain unlawfully acquired ad-

vantages at the expense of his employees and of complying competitors. If this is a burden or a "peril," it is one which an employer with a past record of violations and extensive litigation should be required to assume. The very purpose of the injunction remedy, after violations of the Act have occurred, is to place upon the employer "the risk of crossing the forbidden line" *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, at 192, 193), and thus relieve the Secretary and the courts of some of the burden and expense of repeated enforcement proceedings against prior offenders.

The Act regulates the weekly wage payments of a vast number of employees in hundreds of thousands of establishments throughout the land. It is physically and financially impossible for government investigators to inspect more than a very small percentage of the establishments covered by the Act in any one year; and an establishment once inspected may not see an investigator again for years. The resistant employer is thus in a position to evade compliance by backsliding between investigations or by shifting to new ground, however untenable, with relative safety due to the normal reluctance of employees to litigate against their employer while working for him,[41] the short two-year statute of limitations,[42] the difficulty of

[41] Under Sections 16 (b) and (c), employee suits can be brought only by or on the express request of the individual employees who, so long as they are still on the payroll, are dependent upon him for continued employment and for favorable conditions of employment. See *Holden* v. *Hardy*, 169 U.S. 366, 397; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 394; and *Brooklyn Bank* v. *O'Neil*, 324 U.S. 697, 706–708.

[42] 61 Stat. 84, 87, Section 6, U.S.C. 255.

establishing wilfulness in criminal proceedings,[43] and the unavailability of back-pay orders in actions for an injunction. Only by a prohibitively costly program of constant surveillance can such employers be held to compliance, except to the extent that the limited prospective sanctions of an injunction can be obtained.

This case is an excellent illustration of how overemphasis on the supposed "disadvantages" which an injunction entails for the employer can frustrate the Act's enforcement to the detriment of employees and complying competitors. At the time this action was brought, the Mathis Dam was nearing completion, but it still had a few months to run. Therefore, since there was no reason to believe that respondent had come into compliance following the investigation which uncovered its noncompliance, the Secretary moved for a preliminary injunction. Respondent objected to the issuance of a preliminary injunction on the ground that it would require respondent to pay its employees in accordance with the Act until the case could be heard on the merits, and that respondent might never be able to recover such payments if it should prevail on the coverage issue (R. 9).[44] Al-

[43] See *Brooklyn Bank* v. *O'Neil*, *supra*, 324 U.S. at 709.

[44] This is no defense to a preliminary injunction under the Act. A court of equity has the power and resources for making the necessary "adjustment and reconciliation bet een the public interest and private needs as well as between competing private claims" (*Hecht Co.* v. *Bowles*, 321 U.S. 321, 329–330). The difference between the wages which respondent was paying and the wages which a preliminary injunction would have required it to pay could have been set aside in a special fund or paid into the registry of the court, for return to respondent if it should ultimately prevail, or for distribution to the employees if the Government should prevail.

though the trial court then expressed its conviction that the employees were covered and that it could "not see what additional evidence can be brought forward upon the merits" (R. 46–47), it declined to issue a preliminary injunction on the ground that there was "no pressing need" for it since respondent "is a good, solvent company" (R. 20) "fully able to respond to any judgment" (R. 47). So respondent continued its noncompliance, without any provision having been made to enable the court later to require compliance even for the period subsequent to its announced belief that coverage existed.[45] By the time of the final hearing, the project was virtually completed and the accumulated wage deficiencies, estimated by the Government investigator to be in excess of $70,000 (R. 20) and conceded by respondent to be about $50,000 (R. 66), remained unpaid.

In these circumstances, the injunction issued ultimately by the trial court, limited to this single completed project, left respondent free to retain the accumulated underpayments and to acquire a similar financial advantage while contesting and litigating coverage of any similar future project. Such a short-lived decree is only minimally useful as an enforcement measure in the future; and its effect is to "give

[45] Respondent continued to rely on its self-serving belief that the work was not covered. When questioned about its continued noncompliance after the trial court had clearly stated its views that the Act applied on the Mathis Dam project, the treasurer testified that he thought "it was a tentative opinion" (R. 62), and Mr. Zachry stated that it was his "understanding that there was no firm decision" (R. 66).

tremendous impetus to the program of experimentation with disobedience of the law," which this Court has condemned (*Jacksonville Paper Co., supra,* 336 U.S. at 192)."

The construction industry is "highly competitive," and labor costs are an important factor in bidding on and obtaining contracts (R. 65). The work, moreover, is necessarily discontinuous and is always divided into projects which move toward completion while investigative procedures and administrative efforts to effect compliance run their normal course. Thus, both the temptation to experiment with disobedience and the opportunity to profit from it are especially inherent in the construction industry. Consequently, to limit injunctions in this industry to the particular projects which have been the subject of litigation, is in practical effect to exempt the industry from the enforcement procedures of Section 17. It is, therefore, particularly true in the construction industry that limited injunctions "operate to prevent accountability for persistent" violations, and that court decrees of adequate generality are "necessary to prevent further violations where a proclivity for unlawful conduct has been shown" (*Jacksonville Paper Co.,* 336 U.S. at 192). As this Court observed in *Carpenters Union* v. *Labor Board,* 341 U.S. 707,

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" In a recent case in Louisiana, the employer frankly admitted that he was fully aware of the applicability of the Act but had decided that it was a worthwhile risk, like "any other business risk," if he could get by for about two years before enforcement could catch up with him. *Mitchell* v. *Airlines Foods, Inc.* (Civil Action No. 6322, E.D. La.).

715, in holding that a restraining order was not foreclosed by the completion of the construction project which gave rise to the litigation, the challenged practices may be merely "a sample of what might be repeated elsewhere if not prohibited."[47]

In declining to grant adequate relief in this case, the trial court relied primarily upon its finding that respondent had "acted in good faith" (R. 76). The only support in the record for this finding is respondent's self-serving and uncorroborated assertion of reliance upon advice of counsel,[48] a stock excuse for noncompliance in the region within the jurisdiction of the Fifth Circuit. That court's *Hodges* decision, we believe, has encouraged increased resort to this justi-

[47] Since 1946, respondent has bid on and had awarded to it various types of construction contracts, including highways, railroads, power lines, and water systems and it "intends in the future to continue to bid on and perform such contracts as are awarded to it" (R. 90).

[48] Although respondent's president testified that its legal department had issued a written opinion on the project in question, the written opinion was not offered in evidence. Since the opinion was within respondent's possession and control, and since there was no other support for respondent's claim of reliance on counsel, it may reasonably be inferred that the letter was of doubtful corroborative value to respondent's position. *Cf. Mid-Continent Petroleum Corp.* v. *Keen*, 157 F. 2d 310, 315 (C.A. 8).

In respondent's New Mexico case, where it claimed reliance upon an opinion issued by the Solicitor of Labor, it did produce the opinion, but, as the court there found, it did not support Zachry's position on the work in question (a pavement job for the improvement of the existing airfield at Holloman Air Force Base) since it dealt with an entirely different factual situation. See *Mitchell* v. *H. B. Zachry Company*, 127 F. Supp. 377, 383–384.

fication, and the Labor Department has so advised that court on several occasions, urging modification of the standards there announced so as to counteract the impetus that decision gives to reliance on lax and superficial advice. The Department urged this in the instant case, in *Mitchell* v. *Empire Gas Engineering Co.*, 256 F. 2d 781, and in the recently decided *Blanchard* case (*Mitchell* v. *Blanchard*, decided December 14, 1959, not yet reported, but found in 14 W.H. Cases 378).

The Fifth Circuit, however, still accepts the "advice of counsel" excuse, although in the recent *Blanchard* case the court did state (*id.*, at 380) that it may not be "a safe harbor in every storm." We submit that it should never be regarded as a "safe harbor," so far as past violations of this Act are concerned, except in "storms" where there is some substantial "recognized mitigating factor," such as an offer to make restitution, which is the only reliable test of genuine good faith. For it is evident that the availability of advice of counsel as an excuse for noncompliance leaves it open to the employer to elicit advice of "no coverage" without fully and accurately disclosing to counsel the relevant facts, and that it does nothing to encourage enterprising inquiry by counsel into the facts or thoughtful consideration by him of the controlling law. A non-complying employer could, without perjury, testify to "reliance on advice of counsel," after telephoning his attorney, and receiving an off-the-cuff opinion that on the facts as stated in the conversation, and under the attorney's casual recollection of applicable principles the Act did not apply.

Although the trial court itself was convinced of coverage in the instant case, it thought that there might be "room for an honest belief by defendant that the project was not covered" (R. 76). But an honest mistake as to coverage or the fact "[t]hat a study of the law * * * might have revealed uncertainties in it" is not, standing alone, sufficient to bar injunctive relief. *Mitchell* v. *Southwest Engineering Co.*, 271 F. 2d at 431; *Chambers Construction Co.* v. *Mitchell, supra,* 233 F. 2d at 725. As pointed out by this Court in *Overnight Motor Co.* v. *Missel,* 316 U.S. 572, in rejecting the employer's contention that he should not be subjected to the payment of liquidated damages because his noncompliance was due to the complexities of determining the exemption status of the employee, "Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee" (316 U.S. at 583). This statement, made with respect to liquidated damages for past violations, would seem to be at least equally applicable to the injunction remedy which imposes no hardship upon the employer for past violations, but looks only to the future. Paraphrasing this Court's language in *Jacksonville Paper, supra,* "where as here the aim is remedial and not punitive there can be no complaint that the burden of any uncertainty * * * is on respondents' [employers'] shoulders" (336 U.S. at 193).

A non-complying employer has, of course, the unquestioned right to litigate questions of coverage. But, as the Eighth Circuit has recognized, his in-

sistence on immunity to the point of litigation, when proved to be unwarranted, may itself be a ground for an injunction to free the administrative authorities from the necessity of litigating *de novo* if repetition should occur. See *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766, 770 (C.A. 8); see also the Eighth Circuit's *Chambers* decision, *supra*, 233 F. 2d at 725.

Here, however, the trial court has permitted respondent to shift the entire burden to its employees. As has been noted, the amount withheld from them (up to the time of the preliminary hearing) was at least $50,000, as estimated by respondent itself (R. 66), and much of this accumulated while respondent was litigating and resisting administrative enforcement. It is thus evident that respondent by its assertion of doubt as to coverage, whether made in good faith or not, has secured for itself a substantial bonus, as well as a highly strategic competitive advantage against its competitors in bidding for the project. If, in addition to retaining this advantage, respondent comes out of this litigation subject only to an injunction on a now-completed project, then it remains free to attempt to acquire a similar advantage by repeating the process.[49] A judgment which envisages this

[49] See, *e.g.*, *Castle* v. *Walling*, 153 F. 2d 923 (C.A. 5), in which a second equity suit had to be brought against an employer for renewed deficiencies in wages after an injunction had been denied in the first suit "because [the employer] impressed the court with his honest and bona fide intentions to comply with the Act" (*id.*, at 926). In the circumstances, the court in the second case was limited to an admonitory injunction against a third occurrence.

result, we submit, is not within the bounds of the reasonable exercise of discretion by a court of equity.

Such a judgment fails to deter repetition of violations by removing the greatest practical incentive for noncompliance, *i.e.*, the retention of financial advantages accruing from the violation. It disregards the disadvantages of the burden and expense imposed upon the enforcement agency by repeated investigations and litigation. It disregards the substantial disadvantages to the employees whose enjoyment of their rights is left open to indefinite deferment if the employer should again develop doubts as to some aspect of the Act's application, as well as the disadvantages to law-observing firms who must compete with non-complying firms. These disadvantages to the Government, to the employees, and to law-abiding competitors far outweigh any possible disadvantage to the employer.[50] We submit that where, as here, there have been repeated violations and extensive litigation, employers should be required to assume the "burden of any uncertainty" in their future operations, and this Court, we respectfully suggest, should so declare.

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[50] Moreover, the violations found by the trial court were not the first in respondent's history. Respondent was found to have underpaid its employees in violation of the Act in *Mitchell* v. *Zachry Co.*, 127 F. Supp. 377, in 1955; and has been in difficulties short of litigation on several other occasions. However, the trial court expressly stated that the fact that there had been a total of eight investigations and two lawsuits since 1941 "doesn't mean anything to me" (R. 58).

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded to the trial court with directions to enter the injunction prayed for in the complaint.

Respectfully submitted.

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APPENDIX

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*) are as follows:

SEC. 3. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly

essential to the production thereof, in any State.

* * * * *

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided,* That no court shall have jurisdiction, in any action brought by the [Secretary of Labor] to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

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